

No. 2314

United States
Circuit Court of Appeals

For the Ninth Circuit.

Transcript of Record.
(IN TWO VOLUMES)

PACIFIC PHONOGRAPH COMPANY, a Corpora-
tion,

Appellant,

vs.

SEARCHLIGHT HORN COMPANY, a Corpora-
tion,

Appellee.

VOLUME I.
(Pages 1 to 225, Inclusive.)

Upon Appeal from the United States District Court
for the Northern District of California,
Second Division.

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INDEX OF PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

	Page
Affidavit of Lewis H. Abbott.....	204
Affidavit of Peter Bacigalupi.....	200
Affidavit of Peter Bacigalupi, Jr.....	202
Affidavit of James S. Baley.....	206
Affidavit of C. D. Emerson.....	193
Affidavit of John H. George.....	75
Affidavit of Ellsworth A. Hawthorne.....	57
Affidavit of Louis Hicks, Dated June 7, 1913....	150
Affidavit of Louis Hicks, Filed June 23, 1913....	189
Affidavit of John Kaiser.....	84
Affidavit of Wm. H. Locke, Jr., on Motion for Preliminary Injunction	13
Affidavit of Edward W. Meeker.....	127
Affidavit of John H. Miller, on Behalf of Plain- tiff, on Motion for Preliminary Injunction.	21
Affidavit of Walter H. Miller.....	107
Affidavit of August Robert Pommer.....	197
Affidavit of Camillus A. Senne.....	129
Affidavit of Frank H. Stewart.....	77
Affidavit of Burnham C. Stickney.....	158
Answer of Pacific Phonograph Company, De-	

Index.	Page
Defendant, to the Bill of Complaint of Search-	
light Horn Company, Plaintiff.....	37
Assignment of Errors.....	211
Attorneys, Names and Addresses of.....	1
Bill of Complaint.....	1
Bond on Appeal.....	217
Certificate of Clerk U. S. District Court to Tran-	
script of Record.....	223
Citation on Appeal (Original).....	225
Defendant's Petition for a New Trial.....	31
EXHIBITS:	
Defendant's Exhibits, U. S. and Foreign	
Patents, Opposing Motions for Preliminary	
Injunction.....	229
Letters Patent No. 8824, to F. S. Shirley,	
Patented December 7, 1875.....	231
Letters Patent No. 10,235, to E. Cairns,	
Patented September 11, 1877.....	233
Letters Patent No. 34,907, to C. McVeety	
& J. F. Ford, Patented August 6,	
1901.....	235
Letters Patent No. 72,422, to G. S. Saxton,	
Patented December 17, 1867.....	237
Letters Patent No. 165,912, to W. H. Bar-	
nard, Patented July 27, 1875.....	239
Letters Patent No. 181,159, to C. W. Fal-	
lows, Patented August 15, 1876.....	241
Letters Patent No. 362,107, to C. R. Pen-	
field, Patented May 3, 1887.....	243
Letters Patent No. 406,332, to J. C. Bayles,	
Patented July 2, 1889.....	246

Index.

Page

EXHIBITS—Continued:

Letters Patent No. 409,196, to C. L. Hart, Patented August 20, 1889.....	249
Letters Patent No. 427,658, to J. C. Bayles, Patented May 13, 1890.....	252
Letters Patent No. 453,798, to A. Gersdorff, Patented June 9, 1891.....	255
Letters Patent No. 491,421, to A. Gersdorff, Patented February 7, 1893.....	258
Letters Patent No. 534,543, to E. Berliner, Patented February 19, 1895.....	261
Letters Patent No. 612,639, to J. Clayton, Patented October 18, 1898.....	272
Letters Patent No. 632,015, to G. L. Hogan, Patented August 29, 1899.....	274
Letters Patent No. 647,147, to F. Myers, Patented April 10, 1900.....	277
Letters Patent No. 648,994, to M. D. Porter, Patented May 8, 1900.....	282
Letters Patent No. 651,368, to J. Lanz, Patented June 12, 1900.....	286
Letters Patent No. 692,363, to W. C. Runge, Patented February 4, 1902.....	289
Letters Patent No. 699,928, to C. McVeety & J. F. Ford, Patented May 13, 1902...	294
Letters Patent No. 705,126, to G. Osten & W. P. Spaulding, Patented July 22, 1902	296
Letters Patent No. 738,342, to A. S. Marten, Patented September 8, 1903.....	299

Index.

Page

EXHIBITS—Continued:

Letters Patent No. 739,954, to G. H. Villy, Patented September 29, 1903.....	302
Letters Patent No. 748,969, to C. Melville, Patented January 5, 1904.....	307
Letters Patent No. 763,808, to H. Sturges, Patented June 28, 1904.....	310
Letters Patent No. 769,410, to E. A. Schoet- tel, Patented September 6, 1904.....	313
Letters Patent No. 770,024, to B. Ruggiero & G. Bongiorno, Patented September 13, 1904.....	316
British Letters Patent No. 22,612, to George L. Hogan, Patented November 11, 1899.	319
British Letters Patent No. 7594, to William Phillips Thompson, Patented April 23, 1900.....	323
British Letters Patent No. 9727, to Walter C. Runge, Patented October 4, 1901..	332
British Letters Patent No. 22,273, to Walter C. Runge, Patented July 24, 1902.....	338
British Letters Patent No. 17,786, to Henry Fairbrother, Patented August 13, 1902	342
British Letters Patent No. 20,146, to Gus- tave Harman Villy, Patented June 9, 1903.....	349
British Letters Patent No. 20,567, to John Mesny Tourtel, Patented June 18, 1903.	356
British Letters Patent No. 5186, to Fred-	

Index.	Page
EXHIBITS—Continued:	
erick Charles Cockman, Patented November 17, 1903.....	362
British Letters Patent No. 14,730, to John Mesny Tourtel, Patented March 24, 1904.....	365
French Letters Patent No. 301,583, to Jose Guerrero, Patented June 23, 1900.....	372
French Letters Patent No. 318,742, to Eugene Turpin, Patented February 1902.....	375
French Letters Patent No. 321,507, to W. C. Runge, Patented May 28, 1902.....	393
French Letters Patent No. 331,566, to W. T. P. Hollingsworth, Patented April 28, 1903.....	402
Memorandum of Agreement Between U. S. Horn Co. and Camillus A. Senne.....	145
Names and Addresses of Attorneys.....	1
Notice of Motion for Preliminary Injunction..	11
Order Allowing Appeal.....	214
Order Allowing Withdrawal of Exhibits....	222
Order Denying Petition for New Trial.....	37
Order Extending Time to File Record and to Docket Cause.....	227
Order Fixing Amount of Bond on Appeal.....	216
Order Granting Injunction.....	209
Petition for Allowance of Appeal With Superseas.....	210
Stipulation as to Record and Hearing on Appeal.....	220
Subpoena ad Respondendum.....	9

Names and Addresses of Attorneys.

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Attorneys for Defendant and Appellant.

MILLER & WHITE, Esquires, Crocker Building,
San Francisco, California,

Attorneys for Plaintiff and Appellee.

*In the District Court of the United States for the
Northern District of California, Second Divi-
sion.*

SEARCHLIGHT HORN COMPANY,

Plaintiff,

vs.

PACIFIC PHONOGRAPH COMPANY,

Defendant.

Bill of Complaint.

For Infringement of Patent No. 771,441.

Now comes the Searchlight Horn Company, plain-
tiff in the above-entitled suit, and files this its bill
of complaint against Pacific Phonograph Company,
defendant, and for cause of action alleges:

1. That the full name of the plaintiff is Search-
light Horn Company, and during all the time of the
actual infringement hereinafter complained of said
plaintiff was and still is a corporation created under
the laws of the State of New York and having its

principal place of business at the City of New York in the State of New York.

2. That the full name of the defendant is Pacific Phonograph Company, and since February 1, A. D. 1909, said defendant has been and still is a corporation created and existing under and by virtue of the laws of the State of California and having its principal place of business at the City and County of San Francisco in the State of California.

3. That the ground upon which the Court's jurisdiction depends is that this is a suit in equity arising under the patent laws of the United States. [1*]

4. That heretofore, to wit, on October 4, A. D. 1904, the Government of the United States granted, issued and delivered to one Peter C. Nielsen letters patent of the United States for a new and useful invention, to wit, a horn for phonographs and similar machines; that said letters patent bore date October 4, A. D. 1904, and were numbered 771,441, and granted to the said Nielsen and his heirs and assigns *and* sole and exclusive right to make, use and vend the said invention throughout the United States of America and the territories thereof during the period of seventeen years from said October 4th, A. D. 1904; that a more particular description of the invention patented in and by said letters patent will fully appear from said letters patent which are ready in court to be produced by plaintiff or a duly authenticated copy thereof and of which profert is hereby made.

5. That heretofore, to wit, on January 4th, A. D.

*Page-number appearing at foot of page of original certified Record.

1907, by an assignment in writing plaintiff became and ever since has been, and is now, the sole owner and holder of said letters patent and all the rights thereby granted.

6. That since January 4th, A. D. 1907, plaintiff has made and sold devices covered and claimed by said letters patent and upon each of said devices has marked the word "Patented," together with the date and number of said letters patent.

7. That heretofore, to wit, on May 9, A. D. 1911, plaintiff herein commenced an action at law in the above-entitled court against Sherman Clay & Company, a corporation created under the laws of the State of California and doing business in the Northern District of California, and on said last-named day filed its declarations whereby it alleged the [2] issuance of the aforesaid letters patent, No. 771,441, to Peter C. Nielsen and the ownership thereof by plaintiff since January 4, A. D. 1907, and that said Sherman Clay & Company had infringed upon said letters patent, whereby plaintiff had been damaged in the sum of Fifty Thousand Dollars, and prayed that judgment be rendered against said Sherman Clay & Company for said damages; that thereafter, to wit, on May 25, A. D. 1911, said Sherman Clay & Company appeared in said action and filed its answer denying all the allegations in said declaration, and thereafter, to wit, within thirty days before the trial of said action filed a notice in writing under section 4920 of the Revised Statutes of the United States setting up that the said Nielsen was not the first or original or any inventor of the thing patented

in and by said letters patent, No. 771,441, but that long prior to the supposed invention thereof by the said Nielsen the thing patented in and by said letters patent, No. 771,441, was shown, described and patented in and by certain prior letters patent of the United States and of Great Britain which were specified by given numbers, and that long prior to the supposed invention by the said Nielsen the thing patented in and by said letters patent, No. 771,441, had been made, used and sold by and was known to others in this country, and the names of the persons alleged to have had such prior knowledge and use together with the places where the same was used were set up in detail in said notice; that upon the issues so joined the said action at law against Sherman, Clay & Company came on for trial before the above-entitled court and a jury, which said trial commenced on October 1, A. D. 1912, and was concluded on October 4, 1912; that evidence was introduced by both sides, and the case was fully [3] and fairly tried on its merits and after argument by counsel on both sides was submitted to a jury for decision; that thereafter, on October 4, A. D. 1912, said jury returned its verdict in favor of the plaintiff in said action and against Sherman, Clay & Company, the defendant therein, and assessed damages in favor of said plaintiff and against the said defendant at the sum of \$3,578.00; that thereupon a judgment was duly made and entered in favor of the said plaintiff and against the said Sherman, Clay & Company, defendant in said action, for the said sum of \$3,578.00 and costs of suit; that thereafter in due season

defendant in said action duly and regularly petitioned said Court for a new trial and after arguments of counsel and due consideration of the matter said Court denied said motion for a new trial; that thereafter the plaintiff in the said suit voluntarily remitted from the amount of said damages all of said damages over and above the sum of \$1.00, and the said judgment has never otherwise been changed, altered or modified but is still in full force and effect.

8. That since February 1, A. D. 1909, the defendant herein without the license or consent of plaintiff, in the Northern District of California and elsewhere, has sold and is now using and selling horns for phonographs containing and embracing the invention patented in and by the said letters patent No. 771,441, and thereby has infringed and is now infringing upon said letters patent.

9. That by reason of the infringement aforesaid, the defendant has realized profits and the plaintiff has suffered damages, but the amount of such profits and damages is unknown [4] to plaintiff and can be ascertained only by an accounting.

10. That the plaintiff has requested the defendant to desist from further infringement of said letters patent and to account to plaintiff for the damages suffered by plaintiff and the profits realized by defendant from and by reason of said infringement, but the defendant has failed and refused to comply with said request or any part thereof, and is now extensively selling said infringing horns.

11. That the defendant threatens and intends to continue said infringement during the pendency of

this suit and unless restrained therefrom by this court will continue to infringe during the pendency of this suit, whereby plaintiff will suffer great and irreparable injury, for which it has no plain, speedy or adequate remedy at law.

WHEREFORE, plaintiff prays:

First: That upon the filing of this bill a preliminary injunction be granted enjoining and restraining the defendant, its officers, agents, servants and employees, pending the suit and until the further order of the court from making, using or selling, or threatening, or advertising or offering to make, use or sell any horns for phonographs containing the invention patented in and by said letters patent, No. 771,441, and from infringing upon said letters patent in any manner whatever or aiding or abetting or contributing to any such infringement.

Second: That upon the final hearing the defendant, its officers, agents, servants and employees, be permanently and finally enjoined and restrained from making, using or [5] selling any horns for phonographs or other machines containing the invention patented in and by the said letters patent, No. 771,441, and from threatening or advertising or offering to make, use or sell any such horns and from infringing upon said letters patent in any manner whatever, or aiding, abetting or contributing to any such infringement, and that the writ of injunction accordingly be issued out of and under the seal of this court enjoining the defendant, its officers, agents, attorneys, servants and employees as aforesaid.

Third: That it be ordered, adjudged and decreed that the plaintiff have and recover from the defendant the profits realized by the defendant and the damages sustained by the plaintiff from and by reason of the infringement aforesaid, together with costs of suit and such other and further relief as to the Court may seem proper and in accordance with equity and good conscience.

Fourth: That upon the filing of this bill the writ of subpoena ad respondendum be issued, directed to Pacific Phonograph Company, the defendant herein, commanding it to appear and answer this bill of complaint in accordance with the rules of the Court.

SEARCHLIGHT HORN CO.

By JOHN H. MILLER and

W. K. WHITE,

Solicitors for Plaintiff.

JOHN H. MILLER and

W. K. WHITE,

Of Counsel for Plaintiff,

Crocker Building, San Francisco, Cal.

[6]

United States of America,
Southern District of New York,
County of New York,—ss.

W. H. Locke, Jr., being duly sworn, deposes and says that he is the President of Searchlight Horn Company, the complainant in the within entitled action; that he has read the foregoing bill of complaint and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated on his information or belief, and

as to those matters, that he believes it to be true.

W. H. LOCKE, Jr.

Subscribed and sworn to before me this 1st day of
May, 1913.

DANIEL J. BEGLEY,
Notary Public, #406, New York. [7]
No. 27903.

State of New York,
County of New York,—ss.

I, William F. Schneider, Clerk of the County of
New York, and also Clerk of the Supreme Court for
the said County, the same being a Court of Record,
DO HEREBY CERTIFY, That Daniel J. Begley,
before whom the annexed deposition was taken, was,
at the time of taking the same, a Notary Public of
New York, dwelling in said County, duly appointed
and sworn, and authorized to administer oaths to be
used in any Court in said State, and for general pur-
poses; that I am well acquainted with the handwrit-
ing of said Notary, and that his signature thereto is
genuine, as I verily believe.

IN TESTIMONY WHEREOF, I have hereunto
set my hand and affixed the seal of the said Court and
County, the 1st day of May, 1913.

[Seal]

WM. F. SCHNEIDER.

[Endorsed]: Filed May 9, 1913. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [8]

Subpoena ad Respondendum.

UNITED STATES OF AMERICA.

*District Court of the United States Northern District
of California, Second Division.*

IN EQUITY.

The President of the United States of America,
Greeting: To Pacific Phonograph Company.

YOU ARE HEREBY COMMANDED, That you
be and appear in said District Court of the United
States, Second Division, aforesaid, at the courtroom
in San Francisco, twenty days from the date hereof,
to answer a Bill of Complaint exhibited against you
in said Court by Searchlight Horn Company, a cor-
poration created under the laws of the State of New
York, at the city of New York, and to do and receive
what the said Court shall have considered in that
behalf.

WITNESS, the Honorable WILLIAM C. VAN
FLEET, Judge of said District Court, this 9th day of
May, in the year of our Lord one thousand nine
hundred and thirteen and of our Independence the
137th.

[Seal]

WALTER B. MALING,

Clerk.

By J. A. Schaertzer,

Deputy Clerk.

MEMORANDUM PURSUANT TO RULE 12,
RULES OF PRACTICE FOR THE COURTS
OF EQUITY OF THE UNITED STATES.

YOU ARE HEREBY REQUIRED to file your answer or other defense in the above suit, on or before the twentieth day after service, excluding the day thereof, of this subpoena, at the Clerk's office [9] of said Court, pursuant to said bill; otherwise the said bill may be taken pro confesso.

WALTER B. MALING,
Clerk.

By J. A. Schaertzer,
Deputy Clerk.

RETURN ON SERVICE OF WRIT.

United States of America,
Northern District of California,—ss.

I hereby certify and return that I served the annexed Subpoena Ad Respondendum on the therein named Pacific Phonograph Co., by handing to and leaving an attested copy thereof with A. R. Pommer the Managing Owner of said Pacific Phonograph Co., personally, at San Francisco, in said District, on the 9th day of May, A. D. 1913.

C. T. ELLIOTT,
U. S. Marshal.
By Elmo Warner,
Office Deputy.

[Endorsed]: Filed May 10, 1913. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [10]

*In the District Court of the United States for the
Northern District of California, Second Divi-
sion.*

SEARCHLIGHT HORN COMPANY,

Plaintiff,

vs.

PACIFIC PHONOGRAPH COMPANY,

Defendant.

Notice of Motion for Preliminary Injunction.

To the Pacific Phonograph Company, Its Officers,
Servants, Attorneys, Workmen and Employees:

You are hereby notified that on Monday, the 19th day of May, A. D. 1913, at the hour of ten o'clock A. M., or as soon thereafter as counsel can be heard, plaintiff in the above-entitled suit will move the said court at the courtroom thereof in the United States Postoffice and Courthouse Building, corner of Seventh and Mission Streets, in the City and County of San Francisco, State of California, for an order granting to plaintiff a preliminary injunction enjoining and restraining you until the final hearing of the case from making, using or selling or threatening or advertising or offering to make, use or sell any horn or horns for phonographs either attached to and connected therewith or separate and disconnected from any phonograph or other instrument containing and embodying the invention described in the specification of said letters patent, No. 771,441, and claimed in and by claims 2 and 3 thereof, or either of them, and from infringing upon said claims,

or either of them, of said letters patent in any manner whatever and from aiding or abetting or contributing to any such infringement, and especially and particularly from making, using or selling or threatening or advertising or offering to make, use or sell any horns for phonographs, such as those heretofore and now [11] being sold, advertised, offered for sale and dealt in by you in connection with the Edison cylinder phonographs commonly known as "Flower Horns" or metal-ribbed horns, consisting of metal strips joined together at their edges by a seam so as to provide ribs on the outside of the horn and being tapered and of a bell shape, the same being horns manufactured and furnished to you by Thomas A. Edison, Inc., in connection with the Edison phonographs.

Upon the hearing of this motion plaintiff will use, read and rely upon the bill of complaint herein, the affidavits of Wm. H. Locke, Jr., and John H. Miller, copies of which are herewith attached, together with a copy of the patent No. 771,441 and the catalogue of the Edison phonographs cylinder models, heretofore filed and now on file with the Clerk of the court in this suit, also the judgment-roll, the petition for new trial, the order denying the new trial and the horn exhibits in connection with action No. 15,326 in this court, entitled Searchlight Horn Company vs. Sherman Clay & Company, also the papers and pleadings in the suit in equity in this court of the Searchlight Horn Company vs. Sherman Clay & Company, No. 15,623, the order granting a preliminary injunction and the preliminary injunction itself in said case.

The ground of the above motion is that claims 2 and 3 of said patent No. 771,441 have heretofore been sustainedd and held valid in the aforesaid action at law of this same complainant against Sherman Clay and Company, No. 15,326, and that the issuance of a preliminary injunction herein is necessary and proper and under the rules of practice of this court, and that unless the same is granted plaintiff will suffer great and irreparable loss and injury, for which there is no plain, speedy or adequate remedy at law.

Dated this 9th day of May, 1913.

Yours, etc.,

JOHN H. MILLER and

WM. K. WHITE,

Attorneys and Solicitors for Plaintiff, Crocker
Building, San Francisco, Cal. [12]

*In the United States District Court for the Northern
District of California, Second Division.*

SEARCHLIGHT HORN COMPANY,

Plaintiff,

vs.

PACIFIC PHONOGRAPH COMPANY,

Defendant.

**Affidavit of Wm. H. Locke, Jr., on Motion for
Preliminary Injunction.**

State of New York,

City and County of New York,—ss.

Wm. H. Locke, Jr., being duly sworn, deposes and
says as follows:

This affidavit is made for use on behalf of complainant in support of a motion for preliminary injunction to be hereafter made in a suit in equity having the above title shortly to be commenced in the District Court of the United States for the Northern District of California, Second Division.

I am president of the Searchlight Horn Company, plaintiff, and owner of the Nielsen patent, No. 771,-441, involved in the said proposed suit, and for infringement of which said suit is to be brought.

I became interested in the business of phonographic horns in or about January, 1904, and ever since that time have been connected either directly or indirectly with said business, and am thoroughly familiar with the same, and also with the state of the art as it existed at that time and as it has since been developed. Up to about the year 1907, horns were not made a part of the equipment of the phonograph companies but were manufactured by other parties [13] and supplied by them to the jobbers of phonographs. In other words, the phonograph companies made and sold to jobbers the phonographs themselves and other parties made the horns for such phonographs and sold said horns to the jobbers. This was the state of the business up to some time in the year 1907. Prior thereto, the Searchlight Horn Company had been making and selling to jobbers horns for phonographs containing the Nielsen invention, and had invested large sums of money in said business, selling its horns to various jobbers throughout the United States to be used in connection with phonographs that were made by the phono-

graph companies, and amongst others the National Phonograph Company, controlled by Thomas A. Edison and engaged in the business of making and selling what is known as the Edison phonograph. That some time in the year 1907, or thereabouts, phonograph companies through the United States made the horns a part of their equipment and from that time on sold and do now sell the horn with the phonograph, thereby making it unprofitable for individual horn manufacturers to continue the business as theretofore. In this way the sale of horns became a monopoly with the phonograph companies and the Searchlight Horn Company could no longer continue its business of manufacturing and selling horns at a profit as *therefore*, for the reason that the jobbers were compelled to buy the horns together with the phonographs themselves from the phonograph companies. This forced the Searchlight Horn Company to discontinue the actual manufacture of its horns, and in May, 1908, that company made a business arrangement with other parties to take over its horn manufacturing business, under an agreement for a division of profits, and since that time the Searchlight Horn Company has not been able to make or sell any of its horns though retaining ownership of its patents.

The horns made and sold by the phonograph companies thereafter were largely horns containing the invention of the Nielsen patent and were and still are known to the trade as "Flower Horns," the [14] name originally adopted and applied to the horn by the patentee Nielsen.

When the Searchlight Horn Company discontinued its business of making and selling horns in May, 1908, it endeavored through a long course of negotiations to induce the various phonograph companies, and among them the National Phonograph Company, to make arrangements with the Searchlight Horn Company for payment of a royalty for the use by them of the horns containing the Nielsen invention, having already notified them that the horns which they were making and selling then were an infringement upon said Nielsen patent. The Searchlight Horn Company also endeavored to sell and offered to sell the said patent to the phonograph companies, among them to the National Phonograph Company. These negotiations were carried on for a considerable period of time until September A. D. 1909, when the National Phonograph Company formally and in writing notified the Searchlight Horn Company that no arrangement would be made with the said Searchlight Horn Company for the purchase of the patents, and thereafter the National Phonograph Company continued to infringe upon the Nielsen patent in defiance of the rights of plaintiff by making or causing to be made and selling the so-called Edison Flower Horns.

The Searchlight Horn Company then realized that it *would necessary* to begin legal proceedings against the National Phonograph Company and the other phonograph companies or their distributors for the infringement of the Nielsen patent, and, as president of the Searchlight Horn Company, I interviewed lawyers and endeavored to secure the services of a

patent lawyer, but by reason of the fact that the Searchlight Horn Company was largely in debt and financial distress, I was not able for a long time to secure an attorney who would be willing to undertake the litigation, until in April, 1910, Mr. John H. Miller, an attorney of San Francisco, who was then in [15] New York, was introduced to me by a mutual friend. He stated that he would make a thorough investigation of the matter and if after such investigation he considered that the Searchlight Horn Company had a good case, he would undertake the same. Mr. Miller did make such investigation and amongst other things witnessed the actual demonstration and experiments with various styles of horns, and returned to San Francisco, and commenced an infringement suit there in the month of May, 1911, against Sherman, Clay & Company, the Pacific Coast distributors of the Victor Talking Machine Company. That case was tried in open court in October, 1912, and resulted in a judgment in favor of the Searchlight Horn Company whereby the validity of the Nielsen patent was sustained and damages awarded. I was present at the time of the trial of said case and testified on behalf of the Searchlight Horn Company. After the entry of the judgment, I had personal conferences in New York with representatives of Thomas A. Edison, Inc., the successor of the National Phonograph Company, for settlement of their infringement so that litigation would be avoided, but we were not able to come to terms, and no settlement was effected. Thereupon in March, 1913, the Searchlight Horn Company be-

gan a suit in equity in the above-entitled court at San Francisco against Babson Brothers, charging an infringement of the Nielsen patent by reason of the sale by Babson Brothers of the so-called Edison Horns, which were horns sold by the Edison Company with the Edison phonographs. At the time of commencing said suit, we were informed that Babson Bros. were the sole Pacific Coast distributors of the Edison horns and phonographs, but since then we have been informed that Babson Bros. are only jobbers, and that the Pacific Phonograph Company is the Pacific Coast distributor of the Edison horns and phonographs, for which reason we are now entering suit against said last named company for the purpose of reaching the Edison horns [16] and having the Court determine whether or not they are infringing upon the Nielsen patent. I am informed that the Pacific Phonograph Company is daily supplying and selling to others on the Pacific Coast the so-called Edison horns in connection with the Edison phonographs which said horns contain the invention of the Nielsen patent. If the Pacific Phonograph Company is allowed to continue this course of action pending the suit, the Searchlight Horn Company will be subjected to great and irreparable injury for which in my opinion there is no plain, speedy or adequate remedy at law, and in my judgment a preliminary injunction will be the only adequate protection which the Searchlight Horn Company can obtain. From my experience in litigation I am led to believe that this litigation will be long continued and expensive; that in the ordinary course of events

attending the trial of equity cases it will be a long time before this case can be brought to final hearing, especially in view of the fact that it will be necessary for both sides to take depositions at various places in the United States outside of the Pacific Coast, and then after a decree is entered by this court, if one should be entered, defendant will be entitled to take an appeal therefrom, which would further postpone the time when the complainant could obtain a definite remedy by injunction, whereas, if a preliminary injunction is granted in this case, defendant will either be compelled to cease its infringement and leave the market to complainant, or else will be compelled to obtain its horns from the complainant or some one authorized by the complainant to manufacture under the Nielsen patent. The complainant is and would be willing to supply or cause to be supplied to the defendant and to the Edison Company horns made under the Nielsen patent for a reasonable consideration, and for the payment of a small royalty, whereby the defendant and the Edison Company would be enabled to continue its business without serious damage or loss thereto.

Furthermore there has not been at any time any fixed [17] established royalty for the manufacture and sale of the horns covered by the Nielsen patent, and it is probable that upon the accounting complainant would not be able to prove its damages by such evidence as would be sufficient to clearly establish the same, and will probably be compelled to rely upon a recovery of the defendant's profits, which will involve a long, difficult and intricate proceeding.

Under all these circumstances I think that a preliminary injunction is the only effectual remedy open to the Searchlight Horn Company whereby its rights can be protected. The validity of the Nielsen patent has already been sustained by the verdict of a jury in this court in the case against Sherman Clay & Company, and I am informed that a motion for a new trial in that case has been denied by the Court.

I submit, therefore, that the Searchlight Horn Company is equitably entitled to a preliminary injunction against other parties who are infringing this patent on the Pacific Coast.

WM. H. LOCKE, Jr.

Subscribed and sworn to before me this 1st day of May, 1913.

DANIEL J. BEGLEY,
Notary Public, #406. N. Y. C.
No. 27904.

State of New York,
County of New York,—ss.

I, William F. Schneider, Clerk of the County of New York, and also Clerk of the Supreme Court for the said County, the same being a Court of Record, DO HEREBY CERTIFY, that Daniel J. Begley before whom the annexed deposition was taken, was, at the time of taking the same, a Notary Public of New York, dwelling in said County, duly appointed and sworn, and authorized to administer oaths to be used in any court in said State, and for general purposes; that I am well acquainted with the handwrit-

ing of said [18] Notary, and that his signature thereto is genuine; as I verily believe.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the said Court and County, the 1st day of May, 1913.

[Seal]

WM. F. SCHNEIDER,
Clerk. [19]

*In the District Court of the United States for the
Northern District of California, Second Di-
vision.*

SEARCHLIGHT HORN COMPANY,
Plaintiff,
vs.

PACIFIC PHONOGRAPH COMPANY,
Defendant.

**Affidavit of John H. Miller, on Behalf of Plaintiff, on
Motion for Preliminary Injunction.**

State of California,
City and County of San Francisco,—ss.

John H. Miller, being first duly sworn, deposes and says as follows:

In April, 1910, I was requested by the Searchlight Horn Company to act as its attorney in prosecuting infringers of the Nielsen patent, No. 771,441, involved in this case. I made quite an extensive investigation into the matter for the purpose of obtaining all possible data and completed these investigations sometime in February, 1911. After completing the same, I accepted employment from the Searchlight

Horn Company and as such attorney began a suit in this court at San Francisco against Sherman Clay & Company for infringement of said patent in May, 1911, the same being intended as a test case. After commencing that suit I notified Thomas A. Edison, Inc., of the same and entered into negotiations with them looking towards a possible settlement of the claim of infringement against Thomas A. Edison, Inc. These negotiations were carried on for some considerable time between myself and the attorney for Thomas A. Edison, Inc., [20] but we were unable to agree upon the terms of a settlement and no settlement was made. While the said suit against Sherman Clay & Company was pending, I notified the attorney for Thomas A. Edison, Inc., of the defenses therein set up so that they might be fully advised in the matter as the suit progressed. The Sherman Clay & Company suit was tried in San Francisco early in October, 1912, and resulted in a verdict for plaintiff, sustaining the patent and awarding damages. Thereafter I notified the attorney for Thomas A. Edison, Inc., of the result in that case and sent him a copy of the Court's charge to the jury, so that he might be still further advised of what had occurred therein, and we again entered into negotiations with one another looking towards a settlement. I hoped that after the validity of the patent had been adjudicated in the test case against Sherman Clay & Company that Thomas A. Edison, Inc., would not further contest the matter, but would make settlement with us so that litigation with that company would be avoided, but we were again unable to come to terms and no settlement was made. Under these circum-

stances, I notified Thomas A. Edison, Inc., or rather the attorneys for that company, that I would be compelled to proceed with the litigation against them. Accordingly, in March, 1913, I began an equity suit in this court against Babson Brothers, Incorporated. Said Babson Brothers, Incorporated, was selling and dealing in Edison phonographs and horns at San Francisco, and I was informed that they were the Pacific Coast distributors of the Edison goods. I afterwards learned, however, that Babson Brothers, Incorporated, was merely a jobber, and that the Pacific Phonograph Company, defendant in the above-entitled case, was the Pacific Coast distributor of the Edison goods. I visited the office and place of business of the Pacific Phonograph Company at San Francisco, and ascertained from parties in charge that said company was and is the Pacific Coast distributor of the Edison goods. I have seen the phonograph horns [21] sold and dealt in on the Pacific Coast by the Pacific Phonograph Company, and the said horns are of substantially the same mechanical construction and mode of operation as the horns which were involved in the suit against Sherman Clay & Company, and there held to be an infringement of the Nielsen patent. I have one of such horns in my possession, and will produce it for the inspection of the Court at the hearing of this motion for preliminary injunction. A comparison of the same with the horns involved in the Sherman Clay & Company case, which are still on file with the Clerk of this Court, will show that so far as concerns the invention involved in the Nielsen patent, the two

sets of horns are of substantially the same mechanical construction and mode of operation. I have seen many of these Edison horns on sale by jobbers and dealers on the Pacific Coast, especially at San Francisco, and am told by said dealers and jobbers that they were purchased from Pacific Phonograph Company, the distributor of the Edison goods on the Pacific Coast. When I visited the place of business of the Pacific Phonograph Company recently, as hereinabove stated, I there saw on public exhibition one of said horns, and was told by the clerks in charge that the Pacific Phonograph Company was engaged in selling and marketing such horns. At that time I received from the party in charge of the Pacific Phonograph Co.'s business a catalogue entitled "Edison Phonographs Cylinder Models," as representative of the cylinder phonographs dealt in by the company, together with the horns attached thereto. I herewith file with the Court the said catalogue then and there received by me, and call the Court's attention to the pictures and cuts of horns appearing on pages 18, 19, 20, 15, 16 and 17. On pages 18 and 19 the cuts represent the "Edison Fireside Phonographs" and "Edison Gem Phonograph," to each of which is attached a horn which we claim to be an infringement of the Nielsen patent and which are of substantially the same [22] construction and mode of operation as the horns involved in the Sherman Clay & Company suit. The horns appearing on pages 15, 16, 17 and 20 are likewise, in my opinion, infringements upon the Nielsen patent, and differ from the horns appearing on pages 18 and 19 only in

the fact that a curved neck or mouth piece is attached to the horn which in no manner affects the question of infringement here involved.

I further state that the infringing horns involved in the action at law against Sherman Clay & Co. in this court hereinabove referred to were horns which had been supplied to Sherman Clay & Co. by the Victor Talking Machine Co. in connection with the Victor Talking Machines (phonographs), and said horns were and are known to the trade as "Victor Flower Horns"; those horns are illustrated in the Victor Trade catalogue on file in this court in a suit in equity against Sherman Clay & Co. (No. 15,623), and a sample thereof was offered in evidence by plaintiff in the action at law against Sherman Clay & Co. as an exhibit and is now on file with the Clerk of the Court. A comparison of those Victor Flower Horns with the Edison Flower Horns will demonstrate that if the former are an infringement of Nielsen's patent then the latter are likewise an infringement, as the two sets of horns are of substantially the same mechanical construction and mode of operation. I claim that the said Edison Flower Horns are infringements upon claims 2 and 3 of the Nielsen patent, but this is not to be construed as an admission that they are not infringements on claim 1 of said patent. I attach hereto a copy of the Nielsen patent.

The reasons why an earlier application for an injunction against further sale of the Edison horns has not been made are these: When I took up the matter of infringements on the Nielsen patent said patent had not been sustained or passed on in any con-

tested suit, and as I did not deem it good policy to commence a [23] multiplicity of suits against a multiplicity of persons I instituted a test case against one person, to wit, the said action at law against Sherman Clay & Company for the purpose of adjudicating the validity of the patent hoping that a favorable decision therein would cause other manufacturers to settle with us and cease infringing on our rights without the expense and delay of further litigation. In this, however, I have been disappointed, although I have afforded to the defendant herein ample opportunity for an amicable settlement. Another reason for delay resides in the fact that after the judgment in the Sherman Clay & Company test case was entered, the defendant therein petitioned the Court for a new trial and that petition was not passed on by the Court until April 21, 1913, at which time it was denied by the Court.

I will add that the records of the Secretary of State of New Jersey show that the corporation now known as Thomas A. Edison, Incorporated, was prior to February 28, 1911, named the National Phonograph Company, and that on said last named day said National Phonograph Company changed its name to Thomas A. Edison, Incorporated.

JOHN H. MILLER.

Subscribed and sworn to before me this 9th day of May, 1913.

[Seal] J. A. SCHAERTZER,
Deputy Clerk, U. S. District Court, Northern Dis-
trict of California. [24]

[Endorsed]:

Copy Patent in Suit

No. 771,441.

October 4, 1904.

Peter C. Nielsen

Date of application

April 14, 1904.

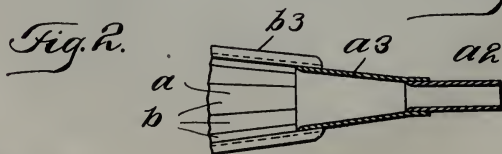
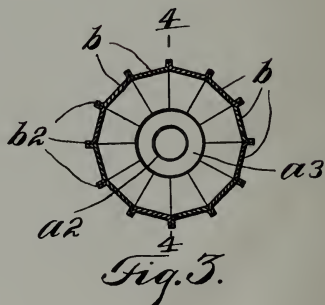
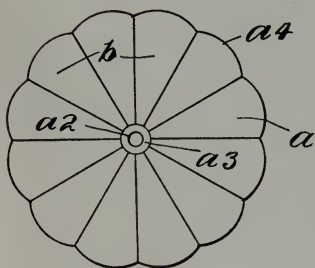
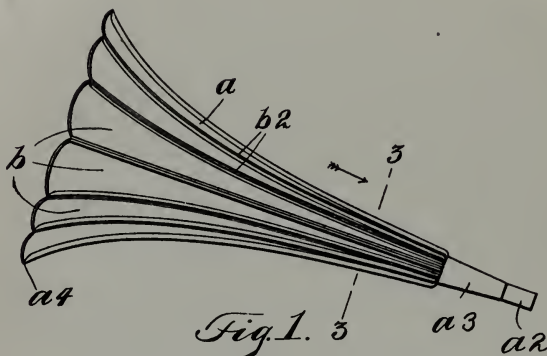
No. 771,441.

PATENTED OCT. 4, 1904.

P. C. NIELSEN.
HORN FOR PHONOGRAPHS OR SIMILAR MACHINES.

APPLICATION FILED APR. 14, 1904.

NO MODEL.



WITNESSES

W. B. Mattingly
F. A. Stewart

Fig. 4.

BY

INVENTOR

Peter C. Nielsen,
Edgar Peters

ATTORNEYS

UNITED STATES PATENT OFFICE.

PETER C. NIELSEN, OF GREENPOINT, NEW YORK.

HORN FOR PHONOGRAPHS OR SIMILAR MACHINES.

SPECIFICATION forming part of Letters Patent No. 771,441, dated October 4, 1904.

Application filed April 14, 1904. Serial No. 203,080. (No model.)

To all whom it may concern:

Be it known that I, PETER C. NIELSEN, a citizen of the United States, residing at Greenpoint, in the county of Kings and State of New York, have invented certain new and useful Improvements in Horns for Phonographs or Similar Machines, of which the following is a specification, such as will enable those skilled in the art to which it appertains to make and use the same.

This invention relates to the horn of a phonograph or other machine of this class; and the object thereof is to provide a horn for machines of this class which will do away with the mechanical, vibratory, and metallic sound usually produced in the operation of such machines, and also produce a full, even, and continuous volume of sound in which the articulation is clear, full, and distinct.

The invention is fully disclosed in the following specification, of which the accompanying drawings form a part, in which the separate parts of my improvement are designated by suitable reference characters in each of the views, and in which—

Figure 1 is a side view of my improved phonograph-horn; Fig. 2, an end view thereof; Fig. 3, an enlarged section on the line 3 3 of Fig. 1, and Fig. 4 a longitudinal section on the line 4 4 of Fig. 3.

In the practice of my invention I provide a horn *a*, provided at its smaller end with the usual nozzle-piece *a'*, by means of which connection is made with the machine, and in the form of construction shown a supplemental piece *a''* is employed between the larger or body portion of the horn and the nozzle-piece *a'*; but the parts *a'* and *a''* may be formed integrally, if desired, and may be constructed in any desired manner. The main part *a* of the horn is bell-shaped in form and tapers outwardly gradually from the part *a'* to the larger or mouth end *a'*, and this curve or taper is greater or more abrupt adjacent to said larger or mouth end. The body portion of the horn is also composed of a plurality of longitudinal strips *b*, which are gradually tapered from one end to the other, and which are connected longitudinally, so as to form longitudinal ribs *b'*, each of the strips *b* being provided at

its opposite edges with a flange *b''*, and these flanges of the separate strips *b* are connected to form the ribs *b'*. The body portion of the horn or the strips *b* are composed of sheet metal, and it will be observed that, the inner wall of the body portion of said horn in cross-section is made up of a plurality of short lines forming substantially a circle, and it is the construction of the body portion of the horn as hereinbefore described that gives thereto the qualities which it is the objects of this invention to produce, which objects are the result of the formation of the horn or the body portion thereof of longitudinal strips *b* and providing the outer surface thereof with the longitudinal ribs *b'* and curving the body portion of the horn in the manner described. If desired, the part *a'* may be formed integrally with the body portion of the horn, in which event the ribs *b'* would extend to the nozzle or connecting portion *a'*, and it is the longitudinal ribs *b'* which contribute mostly to the successful operation of the horn, said ribs serving to do away with the vibratory character of horns of this class as usually made and doing away with the metallic sound produced in the operation thereof.

My improved horn may be used in connection with phonographs or other machines of this class, and changes in and modifications of the construction described may be made without departing from the spirit of my invention or sacrificing its advantages.

Having fully described my invention, what I claim as new, and desire to secure by Letters Patent, is—

1. A horn for phonographs and similar machines, the body portion of which is composed of longitudinally-arranged strips of metal provided at their edges with longitudinal outwardly-directed flanges whereby said strips are connected and whereby, the body portion of the horn is provided on the outside thereof with longitudinally-arranged ribs, substantially as shown and described.

2. A horn for phonographs and similar machines, the body portion of which is composed of longitudinally-arranged strips of metal provided at their edges with longitudinal outwardly-directed flanges whereby said strips

are connected and whereby, the body portion of the horn is provided on the outside thereof with longitudinally-arranged ribs, said strips being tapered from one end of said horn to the other, substantially as shown and described.

5 3. A horn for phonographs and similar instruments, said horn being larger at one end than at the other and tapered in the usual manner, said horn being composed of longitudinally-arranged strips secured together at
10 their edges and the outer side thereof at the

points where said strips are secured together being provided with longitudinal ribs, substantially as shown and described.

In testimony that I claim the foregoing as my invention I have signed my name, in presence of the subscribing witnesses, this 13th day of April, 1904.

PETER C. NIELSEN.

Witnesses:

F. A. STEWART,
C. J. KLEIN.

RETURN ON SERVICE OF WRIT.

United States of America,
Northern District of California,—ss.

I hereby certify and return that I served the annexed Notice of Motion for Preliminary Injunction and Affidavits on the therein named Pacific Phonograph Co., together with a copy of the Bill of Complaint attached thereto, by handing to and leaving a true and correct copy thereof with A. R. Pommer, the managing owner of said Pacific Phonograph Co., personally, at San Francisco, in said District, on the 9th day of May, A. D. 1913.

C. T. ELLIOTT,
U. S. Marshal.
By Elmo Warner,
Office Deputy.

[Endorsed]: Filed May 10, 1913. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [27]

*In the District Court of the United States, in and
for the Northern District of California, Second
Division.*

SEARCHLIGHT HORN COMPANY (a Corpora-
tion),

Plaintiff,

vs.

SHERMAN CLAY & COMPANY (a Corporation),
Defendant.

Defendant's Petition for a New Trial.

Now comes the said defendant and moves the Court

to set aside the verdict of the jury and to grant a new trial herein, for the following reasons:

1. Insufficiency of the evidence to justify the verdict.

2. That said verdict is against law.

3. Errors of law occurring at the trial.

4. Excessive damages appearing to have been given under the influence of passion or prejudice.

The evidence is insufficient to justify the verdict for the following reasons:

(a). The evidence shows that the patent did not describe, cover or claim any patentable invention, and that said patent was void for want of novelty and invention.

(b). The evidence shows that the patentee had taken an old phonographic horn and applied to it a particular form of flanged joint which was the only material difference between the patented horn and several horns of the prior art, and the evidence shows that the defendant had only used such old horn with the same old joint or seam which had been used in the construction of such horns for many years prior to the date of the patent in suit. [28]

(c). The evidence shows that the defendant was not guilty of infringement, for the reason that the phonographic horns sold by them were made substantially like several old horns of the prior art and did not contain the flanged rib joint covered by the patent, and further shows that the defendant did not infringe either of the claims of the patent in suit.

(d). The verdict is against law for the reasons above stated.

The errors in law occurring at the trial are as follows:

(1). The Court erred in refusing to grant defendant's motion for a nonsuit at the close of plaintiff's case in chief.

(2). The Court erred in denying defendant's motion to instruct the jury to find a verdict for the defendant made at the close of the taking of the testimony in the case.

(3). The Court erred in instructing the jury that the evidence showed title in the plaintiff sufficient to entitle him to maintain the suit.

(4). The Court erred in instructing the jury that the plaintiff's patented horn was constructed of metal strips secured together at their longitudinal edges by a seam.

(5). The Court erred in instructing the jury that the plaintiff's patented horn was constructed of metal strips secured together at their longitudinal edges by a seam which produces ribs on the outside of the horn.

(6). The Court erred in instructing the jury that the invention actually covered by the patent does not reside in the particular form of the seam which joins the strips together.

(7). The Court erred in instructing the jury that if the same result produced by the flanged seam shown in the patent as joining the metal strips together is obtainable by any usual form of seam known at the time of Neilsen's invention which operates in substantially the same way to produce the same result, [29] then the substitution of such a seam would not be a departure from the invention but

would be within its real and true scope.

(8). After having given the jury an explanation of what is meant by the term invention, the Court erred in then instructing the jury as follows: "No more exact definition can readily be given you of what constitutes invention as distinguished from mere mechanical skill; but there is one established way or rule which can be easily understood and followed in determining that question whenever the facts of the case make it applicable. That rule is, that in a doubtful case, if it appears by the evidence that the patented device has gone into general use and has superseded prior devices having the same purposes, that it is sufficient evidence of invention and will justify a jury in deciding that the patent involves invention and is valid."

(9). The Court erred in instructing the jury as a matter of law that under any circumstances evidence that the patented device had gone into general use and had superseded prior devices having the same purpose was sufficient evidence of invention to justify a verdict sustaining the patent.

(10). The Court erred in instructing the jury in this case that if they found that after the Neilsen horn became known it went into general use and superseded the prior devices having the same purposes, they should find as a matter of law that the said patented horn involved invention.

(11). The Court erred in instructing the jury that unless they found in one of the prior devices or patents in evidence a disclosure and description of the Neilsen invention as heretofore considered by the

Court it would be their duty to find that there was no anticipation of the Neilsen patent by reason of any of these prior devices or patents.

(12). The Court erred in submitting to the jury the question as to whether the lock seam of the prior art was a mechanical [30] equivalent of the flanged or butt seam as a seam and strengthening rib.

(13). The Court erred in instructing the jury that if they found that the lock seam was the mechanical equivalent of the flanged or butt seam that then they should find that the patent was not anticipated.

(14). The Court erred in instructing the jury as follows: "If, therefore, you find that at the time of Neilsen's invention the lock seam was a mechanical equivalent of the flanged or butt seam in the sheet metal art and that they both accomplished the same result in substantially the same manner as the seam and rib when used in phonographic horns, then you must find that the two things are mechanical equivalents and that the defendant is not relieved from the charge of infringement simply because its horns use the lock seam instead of the flanged or butt seam."

(15). The Court erred in its failure and refusal to give the instructions requested by the defendant as follows: Requests No. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, and 15, and also the requests for instructions under the head of anticipation, infringement and damages, and also its refusal to instruct the jury specifically as to the Villey patent.

(16). The Court erred in submitting the question

of actual damages to the jury, for the reason that there was no evidence in the record that the plaintiff had sustained any actual damages.

(17). The verdict is excessive.

(18). The verdict of the jury is contrary to the law and against the evidence.

Said motion will be made upon the pleadings and papers on file in the cause and upon the minutes of the Court and upon the [31] reporter's transcript of his shorthand notes.

N. N. ACKER and

J. J. SCRIVNER,

Attorneys for Defendant.

Due service and receipt of a copy of the within Petition for New Trial is hereby admitted this 14th day of November, 1912.

MILLER & WHITE,

Attorney for Plaintiff.

[Endorsed]: Filed Nov. 15, 1912. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [32]

At a stated term to wit, the March term, A. D. 1913, of the District Court of the United States of America, in and for the Northern District of California, Second Division, held at the courtroom in the City and County of San Francisco, on Monday, the 21st day of April, in the year of our Lord one thousand nine hundred and thirteen. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

No. 15,326.

SEARCHLIGHT HORN CO.

vs.

SHERMAN, CLAY & CO.

Order Denying Petition for New Trial.

Defendant's petition for a new trial heretofore heard and submitted being now fully considered, and the Court having rendered its oral opinion thereon, and it appearing to the Court that the plaintiff at the time of the argument on said petition, in open court, duly waived its right to any money judgment in excess of \$1.00 and costs, it was ordered that said petition for a new trial be, and the same is hereby, denied. [33]

In the United States District Court, Northern District of California, Second Division.

IN EQUITY—No.—.

U. S. Patent 771,441.

SEARCHLIGHT HORN COMPANY,
Plaintiff,

vs.

PACIFIC PHONOGRAPH COMPANY,
Defendant.

**The Answer of Pacific Phonograph Company,
Defendant to the Bill of Complaint of Searchlight Horn Company, Plaintiff.**

To the Honorable, the Judges of the United States District Court for the Northern District of California, Second Division.

This defendant, in answer to the bill of complaint herein, or to so much thereof as it is advised it is material or necessary for it to make answer to, answering, says:

1. This defendant does not know, and is not informed, save by said bill of complaint, whether or not the plaintiff during all the time of the alleged acts of infringement complained of was or still is a corporation created under the laws of the State of New York or having its principal place of business at the city of New York, State of New York, and, therefore denies the same and leaves the plaintiff to make such proof thereof as it may. [34]

2. Defendant admits that its full name is Pacific Phonograph Company and that it has been and still is a corporation created and existing under the laws of the state of California and having its principal place of business at the City and County of San Francisco in the State of California.

3. Defendant does not know, and is not informed, save by said bill of complaint, whether or not on October 4, A. D. 1904, or at any time heretofore the Government of the United States granted, issued or delivered to one Peter C. Nielsen, letters patent of the United States for an alleged new and useful invention, to wit: A horn for phonographs and similar machines, and therefore denies the same, and leaves the plaintiff to make such proof thereof as it may; and defendant denies that letters patent bearing date of October 4, A. D. 1904, and numbered 771,441, granted to said Peter C. Nielsen, his heirs and assigns, the sole or exclusive right to make, use

or vend the said alleged invention throughout the United States of America and the territories thereof during the period of seventeen years from said October 4, A. D. 1904, or for any other time.

4. Defendant does not know, and is not informed, save by said bill of complaint, whether or not on January 4, A. D. 1904, or at any other time heretofore, by an assignment in writing, or otherwise, plaintiff became or that plaintiff has since been or is now the sole owner or holder of said letters patent, or of any rights granted thereby, and defendant, therefore, denies the same and leaves the plaintiff to make such proof thereof as it may.

5. Defendant does not know, and is not informed, save [35] by said bill of complaint, whether or not since said January 4, A. D. 1907, the plaintiff has made or sold devices covered and claimed by said letters patent, or that the plaintiff has marked the word "Patented," together with the date and number of said letters patent upon any such devices; and it, therefore, denies the same and leave the plaintiff to make such proof thereof as it may.

6. Defendant does not know, and is not informed, save by the bill of complaint:

Whether or not on May 9, A. D. 1911, or at any time heretofore, plaintiff commenced an action at law in the above entitled court against Sherman Clay & Company, a corporation created under the laws of the State of California, and doing business in the Northern District of California, or whether or not on said last named day it filed its declaration whereby it alleged the issuance of the aforesaid

letters patent No. 771,441 to Peter C. Nielsen and the ownership thereof by the plaintiff since January 4, A. D. 1907, and that said Sherman Clay & Company had infringed upon said letters patent, whereby plaintiff had been damaged in the sum of Fifty Thousand Dollars (\$50,000), and prayed that judgment be rendered against said Sherman Clay & Company for said damages.

Or whether or not on May 25, A. D. 1911, or at any other time, said Sherman Clay & Company appeared in said action and filed its answer denying all the allegations in said declaration.

Or whether or not thereafter, and within thirty days [36] before the trial of said action, said Sherman Clay & Company filed a notice in writing under section 4920 of the Revised Statutes of the United States, stating that said Peter C. Nielsen was not the first or original or any inventor of the thing patented in and by said letters patent No. 771,441, and that long prior to the supposed invention thereof by said Peter C. Nielsen the thing patented in and by the said letters patent No. 771,441 was shown, described and patented in and by certain prior letters patent of the United States and of Great Britian, specified by given numbers, and that prior to the supposed invention of said Peter C. Nielsen, the thing patented in and by said letters patent No. 771,441 had been made, used and sold by, and was known to others in this country; or whether or not the names of such persons alleged to have had such knowledge and use, together with the places

where the same was used, were set up in detail in said notice.

Or whether or not upon any issue joined the said action at law against Sherman Clay & Company came on for trial before the above-entitled court and a jury, or whether or not evidence was introduced by either side and the case fully and thoroughly tried on its merits, or whether or not after argument by counsel on either side, the case was submitted to the jury for decision.

Or whether or not thereafter on October 4, A. D. 1912, or at any other time, said jury returned its verdict in favor of the plaintiff in said action and against said Sherman Clay & Company, or assessed damages in favor of said [37] plaintiff and against said defendant or at the sum of Three Thousand Five Hundred Seventy-eight Dollars (\$3,578).

Or whether or not a judgment was duly made and entered in favor of said plaintiff and against said Sherman Clay & Company or for the said sum of Three Thousand Five Hundred Seventy-eight Dollars (\$3,578) or costs of suit.

Or whether or not plaintiff petitioned said Court for a new trial or whether or not said motion was denied.

Or whether or not thereafter the plaintiff in said suit remitted voluntarily or otherwise from the amount of said damages all of said damages over and above the sum of One Dollar (\$1.00), or whether or not said judgment has never otherwise

been changed, altered or modified or is still in full force and effect.

Defendant therefore denies the averments recited in section 7 of the bill of complaint and leaves the plaintiff to make such proof thereof as it may.

7. Defendant further answering denies that since February 1, A. D. 1909, or at any other time, it, the defendant herein, without the license or consent of the plaintiff, in the Northern District of California or elsewhere, has used or sold, or is now using or selling, horns for phonographs containing or embracing the alleged invention of said letters patent No. 771,441, or that it has committed or is now committing any acts of infringement or otherwise in violation of any rights of the plaintiff under and by virtue of said letters patent.

Defendant further denies that it has realized or [38] is now realizing any profits, or that the plaintiff has suffered or is suffering any damages from or due to any act or acts of infringement or otherwise in violation of any rights of the plaintiff under and by virtue of said letters patent.

8. Defendant further denies that the plaintiff has requested it, the defendant, to desist from infringement of said letters patent or to account to the plaintiff for any damages that have been suffered by the plaintiff or profits that have been realized by defendant from and by reason of any infringement of said letters patent; and defendant further denies that it has failed or refused to comply with any such request or with any part thereof, and denies that it has at any time infringed said

letters patent; and defendant denies that it is now selling or has ever sold horns in infringement of said letters patent No. 771,441.

9. Defendant further denies that it threatens or intends or has threatened or intended to continue during pendency of this suit or at any other time any act or acts of infringement or otherwise in violation of any right of the plaintiff under and by virtue of said letters patent, and denies that the plaintiff has suffered any injury from any act or acts unlawfully committed by defendant.

10. Defendant alleges, on information and belief, that the alleged improvement in horns for phonographs or similar machines described and claimed in said letters patent No. 771,441 was not an invention at the time when [39] it was produced; that there was no new function or mode of operation or result attained thereby; that there was nothing substantially new therein, and that in view of the state of the art at the date of the alleged invention, it did not require the exercise of any inventive faculty to devise and produce the horn for phonographs or similar articles described and claimed in said letters patent, but merely the exercise of mechanical skill, and that at the time of the alleged invention by the said Peter C. Nielsen and his application for said letters patent, the state of the art was such that there was nothing of patentable novelty in the said alleged improvement in horns or similar machines for phonographs or in any part thereof.

11. Defendant alleges that said Peter C. Nielsen failed to apply to the Commissioner of Patents of

the United States for said letters patent No. 771,441 in manner and form as by statute required, and that he failed to prosecute an application for said letters patent under and in conformity with the law in such cases made and provided.

12. Defendant alleges, on information and belief, that while the application for said letters patent No. 771,441 was pending in the United States Patent Office, the applicant for the said patent so limited and confined the claims of said application that the plaintiff cannot now seek for or obtain a construction for such claims, or any of them, sufficiently broad to cover the construction used and sold by the defendant. [40]

13. Defendant further alleges, on information and belief, that said letters patent No. 771,441 are invalid and void for the reason that the said Peter C. Nielsen was not the original, first or sole inventor or discoverer of the alleged improvement therein described and claimed or of any material and substantial part thereof, and that substantially the same horn for phonographs or similar machines, and all the material parts thereof, and everything alleged to be new or of invention in said letters patent No. 771,441, are clearly shown and described in and by certain patents granted or applied for prior to the alleged invention thereof by said Peter C. Nielsen, or more than two years prior to his said application for patent therefor, and also in certain printed publications published prior to the alleged invention thereof by the said Peter C. Nielsen, or more than two years prior to his said application for patent therefor; and

that said patents and printed publications, together with the dates of the grant and publication thereof, are as follows:

UNITED STATES LETTERS PATENT.

No. 72,422, dated December 17, 1867, to George S. Saxton.

No. 165,912, dated July 27, 1875, to William H. Barnard.

No. 181,159, dated August 15, 1876, to Charles W. Fallows.

No. 187,589, dated February 20, 1877, to Emil Boesch.

No. 216,188, dated June 3, 1879, to Thomas W. Irwin et al.

No. 240,038, dated April 12, 1881, to Nathaniel C. Powelson, et al.

No. 274,930, dated April 3, 1863, to Isaac P. Frink.

No. 276,251, dated April 24, 1883, to Philip Lesson.
[41]

No. 320,424, dated June 16, 1885, to George W. Woodward.

No. 337,971, dated March 16, 1886, to Henry McLaughlin.

No. 362,107, dated May 3, 1887, to Charles R. Penfield.

No. 406,332, dated July 2, 1889, to James C. Bayles.

No. 409,196, dated August 20, 1889, to Charles L. Hart.

No. 427,658, dated May 13, 1890, to James C. Bayles.

No. 453,798, dated June 9, 1891, to Augustus Gersdorff.

- No. 455,910, dated July 14, 1891, to William J. Gordon.
- No. 491,421, dated February 7, 1893, to Augustus Gersdorff.
- No. 534,543, dated February 19, 1895, to Emile Berliner.
- No. 578,737, dated March 16, 1897, to Philip J. Haas.
- No. 612,639, dated October 18, 1898, to James Clayton.
- No. 648,994, dated May 8, 1900, to Major D. Porter.
- No. 651,368, dated June 12, 1900, to John Lanz.
- No. 692,363, dated February 4, 1902, to Walter C. Runge.
- No. 699,928, dated May 13, 1902, to Charles McVeety, et al.
- No. 705,126, dated July 22, 1902, to George Osten, et al.
- No. 738,342, dated September 8, 1903, to Albert S. Marten.
- No. 739,954, dated September 29, 1903, to Gustave Harman Villy.
- No. 769,410, dated September 6, 1904, to E. A. Schoettel.
- No. 770,024, dated September 13, 1904, to Bartolo Ruggiero et al.
- No. 763,808, dated June 28, 1904, to Hollister Sturges.

PRINTED PUBLICATIONS.

The Electrical World, published at New York, N. Y., article on "Berliner Gramophone," pp. 255-256, issue of Nov. 12, 1887, and article on "The Improved Gramophone," p. 80, issue of August 18, 1888.

A paper read before the Franklin Institute, May 16, 1888, on the Gramophone, by Emile Berliner, published in the Journal of the Franklin Institute at Philadelphia, Pa., [42] June, 1888, and by Rufus H. Darby, printer, in 1894, at Washington, D. C.; and many other publications describing Scott's Phonautograph of 1857.

UNITED STATES LETTERS PATENT FOR
DESIGNS.

No. 8,824, dated December 7, 1875, to Frederick S. S. Shirley.

No. 10,235, dated September 11, 1877, to Edward Cairns.

No. 34,907, dated August 6, 1901, to McVeety et al.

UNITED STATES REGISTERED TRADE-
MARK.

No. 31,772, registered July 5, 1898, by John Kaiser.

BRITISH LETTERS PATENT.

No. 9,762, dated July 5, 1888, to Charles Adams Randall.

No. 14,730, dated 1903, to

No. 17,786, dated August 13, 1902, to Henry Fairbrother.

No. 20,146, dated September 15, 1902, to Gustave Harman Villy.

No. 20,567, dated September 20, 1902, to John Mesby Tourtel.

No. 22,273, dated November 5, 1901, to Walter C. Runge.

No. 22,612, dated November 13, 1899, to George L. Hogan.

No. 7,594, dated April 24, 1900, to William Phillips Thompson.

BELGIAN LETTERS PATENT.

No. 157,009, dated June 10, 1901, to Walter C. Runge.

No. 163,518, dated May 27, 1902, to Walter C. Runge.

No. 175,354, dated January 29, 1904, to L. Aneion.

No. 175,785, dated March 1, 1904, to A. Combret.

No. 176,179, dated March 19, 1904, to H. Sieger.

[43]

FRENCH LETTERS PATENT.

No. 301,583, dated June 23, 1900, to Jose Guerrero.

No. 318,742, dated February 17, 1902, to M. Turpin.

No. 31,470, dated March 25, 1857, to Leon Scott, and
certificate of addition thereto, dated
July 29, 1859.

PRINTED PUBLICATIONS.

The printed copies of the specifications of the aforesaid several Letters Patent of the United States published by the Patent Office of the United States in the city of Washington, in the District of Columbia, on the dates corresponding with the respective dates of said letters patent of the United States and the printed copies of the specifications of the aforesaid British letters patent published by the Patent Office of Great Britain in the city of London, England, on the dates corresponding with the respective dates of printed publication of the complete specifications of the said several British patents, and the printed copies of the specifications of the aforesaid French

letters patent published by the Patent Office of France in the city of Paris, France, on the dates corresponding with the respective dates of publication of the specifications of the said several French patents.

14. Defendant further alleges, on information and belief, that the alleged improvements in horn for phonographs and similar machines described and claimed in said letters patent No. 771,441, and all material and substantial parts thereof were, prior to the date of the alleged invention thereof by said Peter C. Nielsen or more than two years prior to his said application for patent therefor, invented [44] by, known to, and in public use or on sale by the following named persons and parties at the following-named places, to wit:

John Kaiser of New York, N. Y., at New York, N. Y., and elsewhere.

C. A. Senne of New York, N. Y., at New York, N. Y., and elsewhere.

Henry Staude of New York, N. Y., at New York, N. Y., and elsewhere.

Edward A. Merritt of New York, N. Y., at New York, N. Y., and elsewhere.

Bettini Phonograph Company of New York, N. Y., at New York, N. Y., and elsewhere.

Edison Manufacturing Company of West Orange, N. J., West Orange, N. J., New York, N. Y., and elsewhere.

Walcutt, Miller & Co. and Cleveland Walcutt, of New York, N. Y., at New York, N. Y.

Judge Publishing Company of New York, N. Y.,
at New York, N. Y., and elsewhere.

Harms, Kaiser & Hagen of New York, N. Y., at New
York, N. Y., and elsewhere.

Thomas A. Edison of West Orange, N. J., at West
Orange, N. J., and elsewhere.

Mrs. Warren of Buffalo, N. Y., at Buffalo, N. Y.,
and elsewhere.

Louis Atz of New York, N. Y., at New York, N. Y.,
and West Orange, N. J., and elsewhere.

Peter Bacigalupi, of San Francisco, Cal., at San
Francisco, Cal., and elsewhere, and I. W. Nor-
cross of San Francisco, Cal., at New York, N.
Y., and elsewhere.

Edward A. Schoettel of Brooklyn, N. Y., at Brook-
lyn, N. Y., New York, N. Y., and elsewhere.

[45]

George S. Saxton of St. Louis, Missouri, at said St.
Louis, and elsewhere.

William H. Barnard of Sedalia, Missouri, at said
Sedalia, and elsewhere.

Charles W. Fallows of Philadelphia, Pennsylvania,
at said Philadelphia and elsewhere.

Ellsworth A. Hawthorne, of Bridgeport, Conn., at
Philadelphia, Pa., and elsewhere.

Horace Sheble, of Philadelphia, Pa., at said Phila-
delphia and elsewhere.

Emil Boesch of San Francisco, California, at said
San Francisco and elsewhere.

Thomas W. Irwin of Alleghany, Pennsylvania, at
said Alleghany and elsewhere.

George K. Reber of Pittsburg, Pennsylvania, at said Pittsburg and elsewhere.

Nathaniel C. Powelson of Brooklyn, New York, at said Brooklyn, and elsewhere.

Charles Deavs of New York, New York, at said New York and elsewhere.

Isaac P. Frink of New York, New York, at said New York and elsewhere.

Philip Lesson of Newark, New Jersey, at said Newark and elsewhere.

George W. Woodward of Brooklyn, New York, at said Brooklyn and elsewhere.

Henry McLaughlin of Bangor, Maine, at said Bangor and elsewhere.

Charles R. Penfield of Rochester, New York, at said Rochester and elsewhere.

James C. Bayles of New York, New York, at said New York and elsewhere.

Charles L. Hart of Brooklyn, New York, at said Brooklyn and elsewhere. [46]

Augustus Gersdorff of Bridgeton, New Jersey, at said Bridgeton and elsewhere.

William J. Gordon of Philadelphia, Pennsylvania, at said Philadelphia and elsewhere.

Augustus Gersdorff of Washington, District of Columbia, at said Washington and elsewhere.

Philip J. Haas of Marengo, Iowa, at said Marengo and elsewhere.

James Clayton of New York, at said New York and elsewhere.

Major D. Porter of New Haven, Connecticut, at said New Haven and elsewhere.

John Lanz of Pittsburg, Pennsylvania, at said Pittsburg and elsewhere.

Charles McVeety of Philadelphia, Pennsylvania, at said Philadelphia and elsewhere.

John F. Ford of Philadelphia, Pennsylvania, at said Philadelphia and elsewhere.

George Osten of Denver, Colorado, at said Denver and elsewhere.

William P. Spaulding of Denver, Colorado, at said Denver and elsewhere.

Bartolo Ruggiero and Gaetano Bongiorrio of Brooklyn, N. Y., at said Brooklyn, and elsewhere.

Hollister Sturges of New York, N. Y., at said New York and elsewhere.

Albert S. Martin of East Orange, New Jersey, at said East Orange and at Newark, N. J. and elsewhere.

Frederick S. Shirley of New Bedford, Massachusetts, at said New Bedford and elsewhere.

Edward Cairns of Morristown, New Jersey, at said Morristown and elsewhere. [47]

Walter H. Miller of Orange, New Jersey, at New York, N. Y., West Orange, N. J., and elsewhere.

Alexander N. Pierman of Newark, New Jersey, at West Orange, New Jersey and elsewhere.

Edward W. Meeker at Orange, New Jersey, at West Orange, New Jersey, and elsewhere.

Harvey N. Emmons of East Orange, New Jersey, at West Orange, New Jersey and elsewhere.

Arthur Collins of New York, New York, at West Orange, New Jersey and elsewhere.

John Riley of West Orange, New Jersey, at said West Orange and elsewhere.

James Burns of West Orange, New Jersey, at said West Orange and elsewhere.

Frederick S. Brown of Montclair, New Jersey, at West Orange, New Jersey and elsewhere.

C. J. Eichhorn of Newark, New Jersey, at said Newark and elsewhere.

Leonard Terhune of Orange, New Jersey, at Newark, New Jersey, and elsewhere.

George C. Magill of Newark, New Jersey, at said Newark and elsewhere.

Peter Schoepple of Newark, New Jersey, at said Newark and elsewhere.

John H. B. Conger of Newark, New Jersey, at said Newark and elsewhere.

Thomas H. Brady of New Britain, Connecticut, at said New Britain and elsewhere.

August Doig of New Britain, Connecticut, at said New Britain and elsewhere. [48]

William J. Noble of New Britain, Connecticut, at said New Britain and elsewhere.

James Connelly of New Britain, Connecticut, at said New Britain and elsewhere.

Thomas A. Edison, Incorporated, (formerly named National Phonograph Company) a corporation organized and existing under and by virtue of the laws of the State of New Jersey and having its principal place of business in West Orange in said State at said West Orange and elsewhere.

John W. George, of Bridgeport, Conn., at Philadelphia, Pa., and elsewhere.

Tea Tray Company, a corporation organized and existing under and by virtue of the laws of the State of New Jersey and having its principal place of business in Newark in said State, at Newark and elsewhere.

Noble & Brady of New Britain, Connecticut, at said New Britain and elsewhere.

New Jersey Phonograph Company, a corporation organized and existing under and by virtue of the laws of the State of New Jersey and having its principal place of business in Newark in said State at said Newark and elsewhere.

North American Phonograph Company, a corporation organized and existing under and by virtue of the laws of the State of New Jersey and having its principal place of business in Jersey City in said State at said Jersey City and elsewhere.

15. Defendant further says that it has been diligent in ascertaining and setting forth herein instances of prior knowledge, invention, public use, publication and [49] patenting of the invention set forth and claimed in said letters patent No. 771,441, yet believes many further instances exists and prays leave to add the same when ascertained.

16. Defendant alleges that for the purpose of deceiving the public, the description and specification of the alleged invention filed by the said Nielsen in the Patent Office was made to contain less than the whole truth relative to his alleged invention or discovery, and that the description of the alleged invention in the specification is not in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it appertains to make,

construct and use the same.

17. Defendant further alleges, on information and belief, that said letters patent No. 771,441 are invalid and void, because the alleged invention attempted to be patented thereby was at the time it was produced and is now without utility.

18. Defendant further avers and states that the claims as issued in said letters patent No. 771,441 are not distinct, in that they do not particularly point out and distinctly claim the part, improvement, or combination which the said alleged inventor claims as his invention or discovery.

19. Defendant further alleges, on information and belief, that said letters patent No. 771,441 are invalid and void because the alleged invention attempted to be patented [50] thereby had been abandoned to the public prior to the date of the application for said letters patent.

And now, this defendant having answered all and singular those portions of the bill of complaint that it is material and necessary to answer, denies all and all manner of things in the said bill alleged which are not hereinbefore specifically answered unto; and it prays to be hence dismissed with its reasonable costs and charges herein most wrongfully sustained.

PACIFIC PHONOGRAPH COMPANY.

By A. R. POMMER,
President.

Solicitors for Defendant,

H. C. SCHAERTZER and
D. HADSELL.

LOUIS HICKS,

Of Counsel for Defendant. [51]

State of California,

City and County of San Francisco,—ss.

A. R. Pommer, being duly sworn, deposes and says that he is the president of Pacific Phonograph Company, a corporation organized and existing under the laws of the State of California, defendant in the above-entitled suit; that he has read the foregoing answer and knows the contents thereof and that the same is true to his knowledge, except as to the matters which are therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

A. R. POMMER.

Sworn and subscribed to before me this 29th day of May, 1913.

[Seal]

J. D. BROWN,

Notary Public, County of San Francisco, State of California.

Copy of within answer received May 29th, 1913.

MILLER & WHITE,

Attys. for Plff.

[Endorsed]: Filed May 29, 1913. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [52]

[Affidavit of Ellsworth A. Hawthorne.]

District Court of the United States, Northern District of California, Second Division.

EQ. No. 18.

SEARCHLIGHT HORN COMPANY,
Plaintiff,

vs.

PACIFIC PHONOGRAPH COMPANY,
Defendant.

EQ. No. 7.

SEARCHLIGHT HORN COMPANY,
Plaintiff,

vs.

BABSON BROS., INC.,
Defendant.

State of Connecticut,
County of Fairfield,—ss.

Ellsworth A. Hawthorne, being duly sworn, deposes and says: I am over the age of twenty-one years and reside in Bridgeport, county of Fairfield and State of Connecticut. I am president of the Hawthorne Manufacturing Company, Inc., located at Howard Avenue and Spruce Street in Bridgeport aforesaid.

For a number of years prior to 1900 I was located in the city of Philadelphia, Pennsylvania, and was the senior member of the firm of Hawthorne and Sheble of that city, which firm was engaged in the talking machine business, manufacturing and selling

talking machine supplies including horns for phonographs and similar machines. On April 20, [53] 1900, said firm of Hawthorne and Sheble was incorporated as the Hawthorne and Sheble Manufacturing Company, Inc., which carried on the same business as its predecessor up to the year 1909 or until shortly before I moved to Bridgeport and founded my present Company, the aforesaid Hawthorne Manufacturing Company. In October, 1894, the firm of Hawthorne and Sheble purchased from Edward F. Leeds the good will of the phonograph business theretofore done by him in the City of Philadelphia, as agent of John R. Harden, receiver of the North American Phonograph Company, together with all the goods, stock and fixtures of said business which were at 604 Chestnut Street, Philadelphia, including phonographs, phonograph supplies, musical records and phonograph parts of which horns for phonographs formed a part and made, with said Edward F. Leeds, by a contract in writing, dated in October, 1894, certain business arrangements. The firm of Hawthorne and Sheble began the manufacture of horns for phonographs in the latter part of 1894 or the early part of 1895, said Leeds protesting at the time that we did not purchase our large horns from him, and I have been engaged in the making of horns for phonographs and like purposes ever since. I have made hundreds of thousands of horns.

Beginning in the latter part of 1894 or the early part of 1895 and during the years 1895, 1896, 1897, 1898 and 1899, the firm of Hawthorne and Sheble made horns for phonographs and like purposes,

said horns consisting of tapering metal strips joined together at their edges by the well-known tinsmith's seam—namely—the seam known as the lock seam made by bending over the adjoining edges of the tapering metal strips, then interlocking the bent-over portions and pressing them tightly together, the seam being the same as that employed for joining together the metal [54] strips composing the metal horns made and sold by Thomas A. Edison, Inc. These tapering trips joined together at their edges by lock seams extended from one end of the horn to the other. The horns were of different sizes having lengths of thirty-six inches, of forty-eight inches and lengths less than thirty-six inches and greater than forty-eight inches. The tapering strips of which these horns were made by me and my said firm, Hawthorne and Sheble, during the years 1895–1899, inclusive, were so shaped and joined together at their edges by the tinsmith's or lock seam aforesaid that the horns were bell-shaped, being very narrow at the small end and very wide and flaring at the large end. For example, one of our horns thirty-six inches long would have an opening at the large end of the horn thirty-six inches in diameter. When the horns were quite small, say about twenty inches in length, only two of the tapering strips were employed to make the horn, but in making the larger horns at least four of the tapering strips of metal, joined together at their edges by lock seams were employed and at times a greater number of tapering strips so joined together were employed. The horns made of two

strips had two longitudinal ribs, and the horns made of four or more strips had four or more longitudinal ribs, said ribs extending from one end of the horn to the other and being formed by the tinsmith's or lock seam aforesaid. Said horns were made of different kinds of metal such as aluminum, brass, copper, etc. It was more economical to manufacture the horns of several tapering strips of metal, say four or more, than to make the horn of a single piece or of two pieces of metal, since an oblong rectangular piece of metal could be cut diagonally into two tapering strips each of which strips could be used in the making of the horn without waste of the metal. For this reason it was more economical to construct the horns [55] of several tapering strips of metal, say four or more tapering strips, than to construct the horn of one or two pieces of metal and this economy was especially great in the case of the larger horns. Horns made of several tapering strips of metal were known as "built up horns" since they were built up of the several tapering strips of metal in the manner described. The firm of Hawthorne and Sheble began the manufacture of such built up horns as early as 1895.

In 1898-1899 I bought the first Graphophone Grand talking machine put out by the American Graphophone Company, paying about five hundred dollars (\$500.00) for it, and at that time and before 1900 I made horns for use with said Graphophone Grand talking machines. These horns were made in the manner described above. They were built up of tapering strips of metal extending from one end of

the horn to the other, joined together at their edges by the tinsmith's or lock seam. Four or five of such tapering strips of metal were used in the construction of each horn. These horns were thirty-six inches long and had an opening at the large end of the horn thirty-six inches in diameter, the large end of the horn flaring and the horn being bell-shaped.

In 1898, at the time of the Spanish-American war, I and my said firm made two large horns or megaphones which, as I was informed, were intended for use on two of the United States battleships, the Iowa and the Oregon, according to my present recollection of the names of these battleships. These two large horns or megaphones were each about fourteen feet long. They were made in the manner above described, consisting of five or six tapering sheets of metal extending from one end of the horn to the other and joined together at their edges by the tinsmith's or lock seam forming longitudinal ribs extending from one end of the horn to the other. The only difference between these two large horns or megaphones and the other horns composed [56] of several tapering strips, above described was that the two megaphones were of greater size.

I still have the machine used by the said firm of Hawthorne and Sheble in the manufacture of the horns as above described, previous to the year 1900 when the firm was incorporated.

I still have in my possession a metal horn manufactured by my said firm of Hawthorne and Sheble prior to the year 1900. Upon it is marked "Exhibit B, John H. George, Ellsworth A. Hawthorne"; and

hereto annexed is a photographic copy of the said horn. In 1898 or 1899 my said firm of Hawthorne and Sheble made a number of horns like the horn marked in the manner stated. The horn consisted of five tapering strips of metal joined together at their edges so as to form longitudinal ribs extending from one end of the horn to the other. This horn, however, is different from those above described in that the ribs are on the inside instead of on the outside of the horn and in that each of the tapering strips of metal is curved so as to form, by itself, a part of a cone, the five partial cone parts being joined together to form the horn. The metal piece holding the small ring for the support of the horn bears the letters "H. S.," which are the initials of the firm of Hawthorne and Sheble. This horn, of which a photograph is hereto annexed, has been temporarily placed in the custody of defendant's counsel, Mr. Louis Hicks, for the purposes of this suit.

My said firm of Hawthorne and Sheble, during the years 1898, 1899 and 1900 made and sold many horns made of glass for use with phonographs, graphophones or other talking machines. These horns made of glass were shaped to simulate a morning glory and were decorated with morning glories. [57] They were flower horns in shape. Beginning with the year 1900 they were made and sold by the Hawthorne and Sheble Mfg. Co., Inc. I annex hereto a photograph of a circular printed and published in 1900 in Philadelphia by the Hawthorne and Sheble Mfg. Co. The circular is one which I happened to retain in my possession and which has been

submitted to Mr. Louis Hicks for the purposes of this suit. The circular bears the writing "Morning glory Flower Horns—Flower—Printed in 1900—Exhibit A, E. A. Hawthorne," in my handwriting in addition to the printed matter. Prior to the year 1900 my said firm of Hawthorne and Sheble made and sold many other horns similar in shape to the glass horns shown and described upon said circular, but made of metal. These metal horns were made up of longitudinally-extending tapering strips of sheet metal, which were joined together at their edges by the tinsmith's seam, constituting external longitudinal stiffening ribs extending from one end of the horn to the other in the manner above described.

The method of constructing horns, consisting in uniting longitudinally-extending tapered strips of sheet metal along their edges by means of seams, such as the tinsmith's or lock seam, forming longitudinal ribs extending from one end of the horn to the other, was well known and in common use long prior to 1900 as an ordinary tinsmithing operation familiar to us and to other manufacturers of metal goods including the manufacture of metal horns.

My said firm of Hawthorne and Sheble dealt in the well-known Kaiser horn at the time when the originator and maker of said Kaiser horns was a member of the firm of Harms, Kaiser and Hagen during the years 1899 and 1900, said firm of Harms, Kaiser and Hagen being located in the City of New York. The said Kaiser horns, in which we dealt, were made of tapering strips of tough leatheroid paper, overlapping and secured together at their

edges by glue. The [58] overlapping edges thus secured together formed longitudinal ribs extending from one end of the horn to the other, which reinforced or strengthened the horn. The Kaiser horn was an excellent horn for use with the phonograph in reproducing sound records, was very popular, and was sold in large quantities.

The method of constructing the horns for phonographs and similar horns by means of tapered strips of suitable material such as metal, paper, wood, celluloid, etc., secured together at their edges so as to form longitudinal ribs on the outside of the horn, extending from one end of the horn to the other was well known and was practiced by my said firm of Hawthorne and Sheble and by others in this country prior to the year 1900, to my knowledge. When the tapering strips were made of metal, the strips were secured together at their edges by the tinsmith's or lock seam or by some other similar method known in the tinsmith's trade. When material like wood or paper was used the edges of the tapered strips were secured together in a manner suitable for such material as by gluing the overlapping edges, as in the Kaiser horn, or by securing the edges together by means of ribs of wood or metal and with the aid of an adhesive material such as glue, as shown in French patent No. 318,742 of February 17, 1902, to Turpin. The use of glue with wood, paper, celluloid and the like is obviously the same as the use of solder or the tinsmith's lock seam when metal is employed. For many years prior to 1900 horns for phonographs and similar horns were made of metal, of paper, of wood,

of celluloid and of other material such, for instance, as glass. The bell-shaped horn was in common use in this country prior to the year 1900. Various methods were employed in constructing the said horns, the methods being adapted to the material used. It was common practice in this country prior to 1900 to construct horns of tapering strips, of material of different kinds, [59] secured together at their edges so as to form longitudinal ribs extending from one end of the horn to the other and to form, by this method, horns of bell shape, narrow at the small end of the horn and flaring at the large end of the horn.

I have made a careful study of the construction and sound producing qualities of horns for phonographs for nearly twenty years. It is my opinion, based upon many tests, and long experience, that there is no difference in the sound producing qualities of a horn, whether of metal or other material, resulting from the use of one longitudinal rib and from the use of two or more longitudinal ribs. I attribute the perfection of the sound-producing qualities of a horn to its length [and inside [E. A. H.] cubical dimensions] and not at all to any longitudinal ribs with which it may or may not be provided and not at all to the thickness of the material of which the horn may be constructed. The best horns for phonographs with which I am familiar were concert horns made by me for my said firm of Hawthorne and Sheble in Philadelphia in the year 1896. These horns were fifty-six inches long. They were made of four or five

tapering strips of metal (brass) brazed together (that is soldered together) at their edges. The tapering strips extended from one end of the horn to the other. The horns were narrow at the small end and flaring at the large end and of a bell shape, the sides curving gradually outwardly from the small end to the flaring end of the horn. As the edges of the several tapering strips of which these fifty-six inch concert horns were made were brazed together, the edges did not overlap. The method of brazing together the edges of metal strips was, in 1896, the well-known equivalent of joining together such edges by means of any of the other well-known tinsmith's seams such, [60] for instance, as the lock seam. In this instance I preferred brazing the edges together, but in other instances referred to I joined the edges together by the lock seam.

Mr. Louis Hicks, counsel for defendant herein, has exhibited to me two horns which he informed me had been handed to him by Mr. Walter H. Miller, with whom I am well acquainted. These horns are about twenty-one inches long and are made of two tapering strips joined together at their edges by lock seams and a somewhat flaring large end made of two tapering strips similarly joined together by lock seams, the flaring end being joined to the other end of the horn by a similar seam extending around the circumference of the horn. One of these two horns has its small end cut off at about six inches from the small end of the horn, in order, as I am informed, that it might be used as a megaphone for making announcements at the beginning of the recording of phono-

graph records. To my knowledge such horns were upon the market in this country for many years prior to 1900 and were used with phonographs as phonograph horns for reproducing sounds from phonograph records. The lock seams shown by said two horns were the lock seams employed by me in the construction of horns made of tapering strips joined together at their edges, as above described. It is to be understood, however, that in making metal horns of tapering strips joined together at their edges by lock seams I employed tapering strips that extended from one end of the horn to the other.

My attention has been called to an illustration on page 70 of the book entitled "A Complete Manual of the Edison Phonograph," by George E. Tewksbury, published at Newark, New Jersey, by the United States Phonograph Company in 1897. Some of the horns are pyramids with four sides, each side being [61] a tapering strip of metal. Each angle of the horn is a rib or reinforcement. The topmost horn of the illustration shows that the flaring end of the horn is composed of at least three tapering strips of metal secured together at their edges by lock seams. The illustration shows that the lock seam was generally used in joining together the tapering metal strips of which the horns shown in the illustration were constructed. In the center of the illustration there is shown a horn which appears to be a Kaiser horn.

Upon the incorporation of the Hawthorne & Sheble Mfg. Co., Inc., aforesaid, that corporation continued the business carried on by the firm of Hawthorne & Sheble, as already stated. And it continued from

the time of its incorporation until much later than February 10, 1906, to manufacture and sell, for use with talking-machines, such metal horns formed of longitudinally-tapering sections of sheet-metal joined by external longitudinal ribs. There are in existence at the present time specimens of the aforesaid sectional metal horns and of the glass horns of similar shape. We sold and delivered a great many of our said sectional metal horns to the American Graphophone Co., Bridgeport, Connecticut, and to its sales agents, the Columbia Phonograph Co.

February 10, 1906, said Hawthorne & Sheble Mfg. Co. was located at Oxford and Mascher Streets, in Philadelphia aforesaid. On or about that date we received a visit from a patent attorney named William H. Locke, Jr., of No. 46 West 34th Street, New York City, who represented himself as the attorney for the United States Horn Co., which claimed to own a certain Villy patent and the Nielsen patent No. [62] 771,441, which I understand is the patent involved in this controversy. Said Locke told us that the owners of said patents desired our company to enter into a combination with them, and that his clients would license certain manufacturing concerns, including the Hawthorne & Sheble Mfg. Co., the Tea Tray Co., and the Standard Metal Goods Mfg. Co., under said patents. After examining the two patents aforesaid, and upon the advice of our patent counsel, we notified Mr. Locke that we would not enter into such combination. We further told him we would not recognize the validity of the Nielsen patent aforesaid; but were ready to litigate said patent

if its owners so desired. We never heard anything further from Mr. Locke, or from anyone else on behalf of said Nielsen patent; nor were we ever attacked as alleged infringers of said Nielsen patent, though we continued to manufacture and sell the sectional metal horns aforesaid.

I annex hereto a copy of an advertisement of the Hawthorne & Sheble Mfg. Co., which appeared in the first issue, Vol. 1, No. 1, of the Talking Machine World of January 15, 1905. In this advertisement there is shown one of the metal flower horns which we were then making according to the same method in which the firm of Hawthorne & Sheble had made horns composed of tapering strips joined together at their edges by lock seams prior to the year 1900 and which we continued to make after the date of said advertisement and after the date of the said visit of William H. Locke, Jr. I have never known of any attempt to enforce the Nielsen patent No. 771,441, except by threat, from the time of the issue of the patent on October 4, 1904, until the trial of the suit of this complainant against the Sherman Clay Company, which I am informed took place in California in October, [63] 1912, notwithstanding the fact that manufacturers of horns in the eastern part of the United States had been making horns similar to our flower horn shown in said advertisement continuously from time of the grant of the said Nielsen patent on October 4, 1904, as they had been making horns in the same manner continuously for several years prior to the grant of the patent and prior to the year 1900.

I annex hereto four diagrams, of which diagram No. 1 shows the shape and length of the concert horn made, in 1896, of tapering strips of metal having their edges brazed together as above described; and diagram No. 2 shows the shape and length and the width at the flaring end of the horn made in 1898-1899, of tapering strips of metal having their edges joined together by the tinsmith's or lock seam for the Graphophone Grand talking machine, as above described; and diagram No. 3 shows a rectangular oblong piece of sheet metal cut diagonally so as to form, in an economical manner, two tapering strips of metal, which can be used in the manufacture of a horn by joining their edges together after inverting one of the two tapering strips and assembling it with other tapering strips in the manner shown in diagram No. 4, according to the method employed by said firm of Hawthorne and Sheble prior to the year 1900.

At the present time and for several years last past the demand for horns for phonographs such as the horns of the Nielsen patent in suit and other similar horns that are exposed to view has very greatly diminished by reason of the fact that talking machines are now, and have for [64] several years last past been, concealed in cabinets requiring the employment of an entirely different sound amplifier concealed within the cabinet.

ELLSWORTH A. HAWTHORNE.

Subscribed and sworn to before me this 3d day of June, 1913.

[Notary's Seal] CLAYTON A. BALDWIN,
Notary Public, County of Fairfield, State of Connecticut. [65]

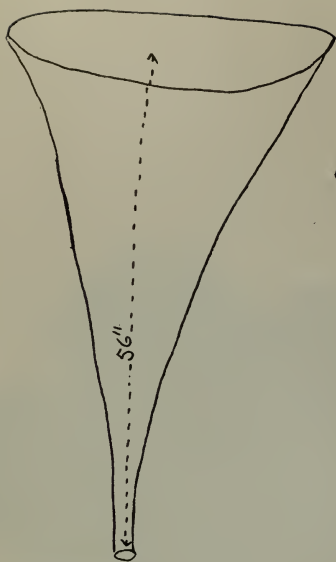


Diagram No. 1

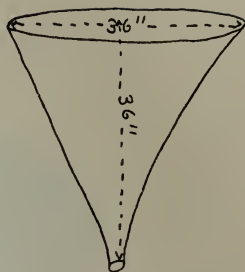


Diagram No. 2

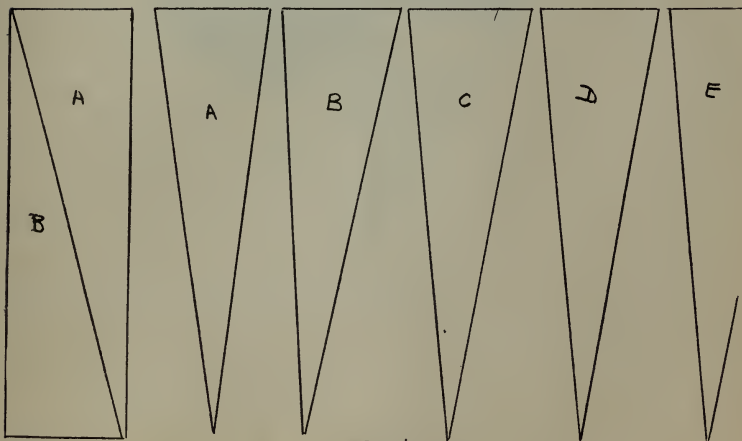


Diagram No. 3

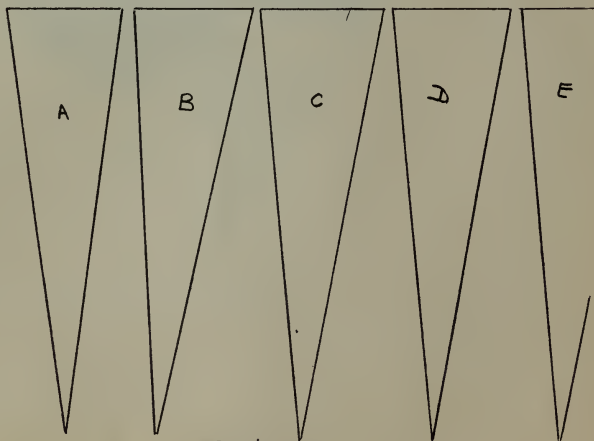


Diagram No. 4



105 Hawthorne and Shebles
fluted hoarles 1898-1899

EXHIBIT A.

GLASS HORNS.



For Graphophones and Phonographs

Decided Novelties, made on the latest approved accoustic lines. Present a very good appearance, take up but very little room and are made of heavy glass to insure safety in handling. Give a clear, bell-like tone in reproducing.

PRICES:

No. 1—	Clear Glass,	14 in. body,	9 in. bell,	. . . .	\$3.00
No. 2—	"	14 in.	9 in. " scolloped,	3.25	<i>flour</i>
No. 3—	"	19 in.	10 in. "	. . . .	3.75
No. 4—	Etchied	14 in.	9 in. "	. . . .	3.75
No. 5—	"	19 in.	10 in. "	. . . .	4.25
No. 6—	Ruby	14 in.	9 in. "	. . . .	4.25
No. 7—	"	19 in.	10 in. "	. . . .	5.50

In Ordering mention Number.

Exhibit A
HAWTHORNE & SHEBLE MFG. CO.
E. C. Hawthorne

Incorporated

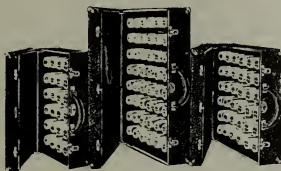
602-4-6 Chestnut St., Philadelphia.

297 Broadway, New York.

Printed in 1900

We Manufacture Everything for Talking Machines.

Cylinder Record Carrying Cases.



We manufacture the best and most complete line. Our styles are up-to-date.

HORNS

We made the first Brass Horns used on Talking Machines, and now make over 100 different styles.

Our facilities are the largest.

Our Product the best.

Our Prices the most attractive.



HORN SUPPORTS.

We make many varieties and illustrate two of the most popular.



No. 19. Horn Stand. All sections heavy, strong, durable. Separable Top can be quickly adjusted. Handsomely Nickel Plated and Polished.

PATENTED.

No. 5. Horn Crane. Instantly adjusted to Home, Standard, or Triumph Phonograph without injuring cabinet. Used to support horns up to and including 36" long.

PATENT APPLIED FOR.



No. 88.

Disc Machine and Record Carrying Cases.

We manufacture a complete line for all style machines. Compact, Strong and Durable.

Our Patented Silk Finish Horns are now recognized as standard throughout the Talking Machine Trade.

Our Flower Horns are classed as the handsomest talking machine horns which have been placed on the market.



No. 91.

Remember, "We manufacture everything for Talking Machines," and we are the only parties in the U. S. making a complete line. If you are interested, a postal card will bring you our New Catalogue, No. 600, containing full information regarding supplies of every description.

HAWTHORNE & SHEBLE MFG. CO.

Mascher and Oxford Streets,

PHILADELPHIA, PA., U. S. A.

[Affidavit of John H. George.]

District Court of the United States, Northern District of California, Second Division.

SEARCHLIGHT HORN COMPANY,

Plaintiff,

vs.

PACIFIC PHONOGRAPH COMPANY,

Defendant.

SEARCHLIGHT HORN COMPANY,

Plaintiff,

vs.

BABSON BROS. INC.,

Defendant.

State of Connecticut,

County of Fairfield,—ss.

John H. George, being duly sworn, deposes and says:

I reside in the city of Bridgeport, Conn., and am employed by the Hawthorne Mfg. Co., Inc., of Bridgeport, Conn.

Prior to 1898 I resided in Philadelphia, Pa., and was employed by Messrs. Ellsworth A. Hawthorne and Horace Sheble, who carried on business under the firm name of Hawthorne and Sheble in that city. I continued with Hawthorne and Sheble until their business was incorporated in 1900 as the Hawthorne & Sheble Manufacturing Company and thereafter I continued my same employment with that corporation. When Mr. Hawthorne founded the Hawthorne Manufacturing Company, aforesaid, I came

to Bridgeport and entered [70] its employ where I have remained ever since. I have thus been continuously employed with Mr. Hawthorne for more than fifteen years, and during all that time we have been manufacturing various articles of sheet metal, including horns for use with talking machines.

I have read the annexed affidavit signed and verified by Mr. Ellsworth A. Hawthorne; and the statements therein set forth are, to the best of my knowledge, information and belief, correct. I know that prior to the year 1900 said firm of Hawthorne and Sheble manufactured and sold at Philadelphia, Pa., as a regular product, many metal horns composed of tapering strips of metal, extending from one end of the horn to the other and joined together at their edges by the ordinary tinsmith's or lock seam, forming, on the outside of the horn, longitudinal ribs extending from one end of the horn to the other. I personally assisted in the making of such horns before the year 1900 as well as after the year 1900. Specimens of such sectional metal horns made before the year 1900 are in existence at the present time.

When the horns were small, only two tapering strips of metal were used in making the horn, but when the horns were larger, having lengths of thirty-six inches, forty-eight inches, fifty-six inches or greater lengths, four or more tapering strips of metal were employed, prior to the year 1900, to build up the horns.

I recollect that prior to the year 1900 Hawthorne and Sheble made the concert horns fifty-six inches long; made the horns for the Graphophone Grand

talking machines thirty-six inches long; made the large horns or megaphones for the two United States battleships; made the horns composed of [71] five partial cones and similar to the one marked "Exhibit B—John H. George—Ellsworth A. Hawthorne"; and made other metal horns composed of tapering strips of metal, extending from one end of the horn to the other and joined together at their edges by lock seams forming longitudinal ribs on the outside of the horn, extending from one end of the horn to the other, said horns being narrow at the small end and flaring at the large end and being of bell shape, all in the manner, shape, form and number of tapering strips of metal described in the annexed affidavit of Mr. Ellsworth A. Hawthorne; and made horns of glass as described in Mr. Hawthorne's annexed affidavit.

JOHN H. GEORGE.

Subscribed and sworn to before me this 3 day of June, 1913.

[Notary's Seal] CLAYTON A. BALDWIN,
Notary Public, County of Fairfield, State of Connecticut. [72]

[Affidavit of Frank H. Stewart.]

District Court of the United States, Northern District of California, Second Division.

SEARCHLIGHT HORN COMPANY,

Plaintiff,

vs.

PACIFIC PHONOGRAPH COMPANY,

Defendant.

SEARCHLIGHT HORN COMPANY,

Plaintiff,

vs.

BABSON BROS., INC.,

Defendant,

State of Pennsylvania,

County of Philadelphia,—ss.

Frank H. Stewart, being duly sworn, deposes and says:

I am over twenty-one years of age and am engaged in business at No. 50 North Eighth Street, Philadelphia, Pa. On the Monday after Thanksgiving day in November, 1894, I became connected with the firm of Hawthorne & Sheble, whose place of business then was at 604 Chestnut Street, Philadelphia, where the Philadelphia business of John R. Harden, receiver of the North American Phonograph Company, had been carried on by his agent, Edward F. Leeds. From that time until 1908 I continued to be connected with the said firm of Hawthorne & Sheble and its successor, the Hawthorne & Sheble [73] Mfg. Co., which was incorporated in April, 1900, in Philadelphia, Pa., Springfield, Mass. and New York, N. Y., except that for the period of one year, about 1900, I was not connected with said firm or corporation.

To my knowledge the firm of Hawthorne & Sheble manufactured thousands of horns for phonographs at Philadelphia, Pa., prior to the year 1900 and beginning in the latter part of 1894 or the early part of 1895. I remember distinctly that from 1895 to 1899 said firm of Hawthorne & Sheble made and sold, in

Philadelphia, Pa., metal horns for phonographs, consisting of tapering metal extending from one end of the horn to the other and joined together at their edges by the well-known tinsmith's or lock seam forming longitudinal ribs on the outside of the horn, extending from one end of the horn to the other. When the said horns were small horns, say about twenty inches in length, two of such tapering strips were used to make the horn; but when the horns were larger, having lengths, for instance, of thirty-six, forty-eight or fifty-six inches or more, four or more of such tapering strips were used to make the horn. Such horns were narrow at the small end and flaring at the large end, being bell-shaped, the tapering strips curving outwardly and gradually from the small end to the flaring end of the horn. One reason for making the larger horns of several tapering strips of metal was that it was more economical to build up a horn of several tapering strips than it was to make the horn of a single piece of sheet metal or of two pieces of sheet metal, since a narrow rectangular oblong sheet of metal could be cut into suitable tapering strips for building up a horn without waste of the sheet metal. [74]

I recollect that in 1898-1899 Mr. Ellsworth A. Hawthorne of Hawthorne & Sheble purchased the first Graphophone Grand talking machine sold by the American Graphophone Company and that thereupon, at that time and before the year 1900, Hawthorne & Sheble manufactured horns for use with the said Graphophone Grand talking machine. These horns were thirty-six inches long and thirty-six in-

ches in diameter at the large or flaring end of the horn. The horns were bell-shaped, narrow at the small end and flaring at the large end and were composed of four or five tapering metal strips extending from one end of the horn to the other and joined together at their edges with the ordinary tinsmith's or lock seam, so as to form longitudinal ribs extending from one end of the horn to the other, the metal of the lock seams being so joined together that the ribs were formed on the outside of the horn and not on the inside thereof in the manner shown by two small horns, about twenty-one inches long in the possession of Mr. Louis Hicks, counsel for defendant herein, and exhibited to me, said two small horns being made up, however, of two tapering strips of metal joined together at their edges with such lock seams and being provided with a somewhat flaring large end composed of two tapering strips of metal joined together by such lock seams, said flaring end being joined to the other part of the horn by a similar lock seam extending around the circumference of the horn, about six inches of one of said small horns having been removed from the small end of the horn in order that it might be used, as I am informed, as a megaphone for making announcements at the beginning of the recording of the phonograph record.

At the time of the Spanish-American war in 1898 Hawthorne & Sheble made two large horns or megaphones for [75] two of the United States battleships, the Iowa and Oregon, according to my present recollection of the names of said battleships; these horns were about fourteen feet long. They were

built up of five or six tapering strips of metal extending from one end of the horn to the other and joined together at their edges by lock seams so as to form longitudinal ribs on the outside of the horn.

In 1896 Hawthorne & Sheble made concert horns about fifty-six inches in length and similar in shape to the above described horns for the Graphophone Grand talking machines. These concert horns were built up of four or five tapering strips of metal having their edges brazed together, the strips extending from one end of the horn to the other and the horn being narrow at the small end and flaring at the large end and of bell shape, the strips curving outwardly gradually from the small end to the flaring end of the horn. In 1898-1899, the firm of Hawthorne & Sheble also made horns composed of five tapering strips of metal joined together at their edges and extending from one end of the horn to the other, each of said strips being curved so as to form part of a cone and the five partial cones being joined together at their edges to form the said horn. In this case, the edges of the tapering strips were so joined together as to form longitudinal ribs on the inside of the horn. One of said horns has been submitted by Mr. Ellsworth A. Hawthorne to Mr. Louis Hicks for the purposes of this suit and is marked "Exhibit B—John H. George—Ellsworth A. Hawthorne," and on the piece of metal holding the ring for supporting the horn appear the initials "H. S.," the initials of Hawthorne and Sheble, the copartnership which became the Hawthorne & Sheble Mfg. Co. upon its incorporation in April, 1900. [76]

Hawthorne and Sheble made many such horns prior to the year 1900. In 1899-1900 Hawthorne and Sheble dealt in the well known Kaiser horn at the time when its originator and maker, Mr. John Kaiser, was a member of the firm of Harms, Kaiser & Hagen doing business in the city of New York. These Kaiser horns were made of tapering strips of tough leather-like paper overlapping and joined together at their edges by a glue, making longitudinal ribs extending from one end of the horn to the other. These Kaiser horns differed from the metal horns made by Hawthorne and Sheble prior to the year 1900 only in that Hawthorne and Sheble made their horns of tapering strips of metal while Mr. John Kaiser made his horn of tough leather-like material, and in that Hawthorne & Sheble joined the tapering strips of metal together by the ordinary tinsmith's or lock seam, while Kaiser joined his tapering strips of tough leather-like material together by means of glue, the different means of joining the tapering strips differing because of the difference in the material employed for building up the horns, the said methods of joining such strips of such material being well known in the art of making horns for phonographs and other horns for many years prior to the year 1900.

My attention has been called to page 70 of a book entitled "A Complete Manual of the Edison Phonograph," by George E. Tewksbury, published at Newark, New Jersey, in 1897, which sets forth an illustration of phonograph horns, among which are to be seen pyramidal horns having four tapering

sides forming four longitudinal ribs or edges where the four tapering sides come together, and showing also, what appears to be a Kaiser horn, and showing also, at the top of the illustration, a large horn of which the flaring end is [77] made of at least three tapering strips of metal joined together at their edges by lock seams, the remaining part of the horn being composed, apparently, of single strips of metal joined together at their edges. The common use of the lock seam in the year 1897 and prior thereto in the making of horns for phonographs is apparent from this illustration.

I have had a wide experience with horns for phonographs and my conclusion is that it is immaterial, so far as the sound producing qualities of the horn are concerned, whether the horn is provided with one or two or more longitudinal ribs or seams or whether the seam is on the outside or on the inside.

For several years last past horns for phonographs, such as the horns of the Nielsen patent in suit and the horns that were in use prior to the year 1903, as well as prior to 1900, have been going out of use very rapidly for the reason that for several years last past most of the phonographs made and sold are concealed in cabinets and employ very different sound amplifiers, which are concealed with the phonograph within the cabinet. Reference to the catalogues of the well-known manufacturers of talking machines will show this to be a fact.

FRANK H. STEWART.

Subscribed and sworn to before me this 4 day of June, 1913.

[Notary's Seal] GROVER C. LADNER,
Notary Public, County of Philadelphia, State of
Pennsylvania.

Commission expires Mar. 25, 1917. [78]

[Affidavit of John Kaiser.]

*District Court of the United States, Northern Dis-
trict of California, Second Division.*

SEARCHLIGHT HORN COMPANY,
Plaintiff,

vs.

PACIFIC PHONOGRAPH COMPANY,
Defendant.

SEARCHLIGHT HORN COMPANY,
Plaintiff,

vs.

BABSON BROS. INC.,
Defendant.

State of New York,
County of New York,—ss.

John Kaiser, being duly sworn, deposes and says: I am over the age of twenty-one years and reside at 101 East Tremont Avenue, in the city of New York. I have been in the phonograph and talking machine business ever since the year 1891. I began with the New York Phonograph Company in 1891 at 257 Fifth Avenue, New York City, and continued with that company until its business was

taken over by the North American Phonograph Company in 1893, whereupon I continued with the North American Phonograph Company until that company went into the hands of a receiver, John R. Harden, in May, 1894. I then engaged in giving exhibitions of the phonograph in New York State until the fall of 1894, [79] when I entered the employ of the firm of Walcutt, Miller & Co., doing business 110 East 14th Street, New York City. I left Walcutt, Miller & Co. about the year 1896 and then became connected with the Phonograph Record and Supply Company in Reade Street and continued with that company until 1897, Messrs. Walter H. Miller and Henry J. Hagen, who had formerly been members of the firm of Walcutt, Miller & Co., being members of the Phonograph Record and Supply Co. In 1897 I became connected with the Judge Publishing Company at 110 Fifth Avenue, New York City, and continued with that company until January, 1899, when I became a member of the firm of Harms, Kaiser & Hagen, which was formed in the latter part of 1898, and continued with that firm until July, 1900, whereupon I went into business on my own account for one year until July, 1901. I then became connected with the Universal Talking Machine Company of New York City, and continued with that company until 1904, when I became connected with the Douglas Phonograph Company at 89 Chambers Street, New York City; and I have continued in the Phonograph and talking machine business ever since. From 1891 down to the present time I have

paid particular attention to the recording and reproducing of sound by means of phonographs and other talking machines and to horns for phonographs and similar machines. All of the concerns which I was connected with, as above stated, were engaged in the talking machine business.

In October or November, 1895, I made the first "Kaiser Horn." I gave the first exhibition of the Kaiser horn in St. George's Parish House in Sixteenth Street, New York City, during Thanksgiving week in November, 1895. The Kaiser horn met with much success, and I received many compliments on account of it. Thereupon, while I was still [80] with Walcutt, Miller & Co., I presented a Kaiser horn to Mr. Walter Miller and another to Mr. Henry J. Hagen, members of the firm of Walcutt, Miller & Co. Mr. Miller told me at that time that he had exhibited the horn to Mr. Thomas A. Edison, who, according to Mr. Miller's statements, expressed himself as being well pleased with the horn.

The Kaiser horn referred to was made of twelve tapering strips of tough leather-like paper, which overlapped and were glued together at their edges forming longitudinal seams or ribs extending from one end of the horn to the other and strengthening and reinforcing the horn.

On April 14, 1898, I filed an application for the registration of a trademark, to wit "Kaiser Horn", in connection with an illustration of the horn, and set forth that this trademark had been continuously used in my business since September 1, 1897, which

statement was correct. Upon this application trademark No. 31,772, registered July 5, 1898, was issued to me, and I annex to this affidavit a copy of the said trademark. I have preserved the Kaiser horn from which the drawing of the horn shown in said trademark No. 31,772 was made; and I have submitted this horn to Mr. Louis Hicks, counsel for defendant herein, and I annex hereto a photograph of said horn designated "Kaiser Horn of 1898." It will be seen from an inspection of the horn itself and of the photograph thereof that the horn was made in the manner above described. It will be noticed also that the said horn, the photograph thereof and the drawing thereof in said trademark all show that the Kaiser horn was narrow at the small end and flaring at the large end and [81] bell-shaped, the tapering strips of which the horn was made curving gradually outwardly from the small end to the large end of the horn. I am familiar with the Nielsen patent No. 771,441 of October 4, 1904, and the drawings thereof. I can see no difference between the horn shown and described in the Nielsen patent and my Kaiser horn made as stated above in October or November, 1895. The Nielsen horn and the Kaiser horn are each made of tapering strips secured together at their edges so as to form seams or ribs extending longitudinally along the horn from one end of the horn to the other. in each case the ribs serve to strengthen and reinforce the horn. I preferred to make the Kaiser horn of a tough leather-like material, because, in my opinion, such material gave a better reproduction

of sound. Metal has a vibration that is sympathetic with certain musical notes, and this sympathetic vibration of the metal gives a blasting of the high notes. I therefore made the Kaiser horn of tough leather-like paper since such material and material such as wood give to the reproduction of sound a mellow musical quality and are particularly good in reproducing the detail of a phonograph record. The shape of the Nielsen horn is a copy of the shape of the Kaiser horn. Since I employed paper instead of metal it was advantageous to secure together the edges of the tapering strips by means of some adhesive substance such as glue. Had I employed tapering metal strips to make the Kaiser horn I should have employed one of the well-known tinsmith's seams such, for instance, as the lock seam then in common use in the construction of phonograph horns, for joining together the edges of the tapering metal strips. In 1895 and for several years prior thereto, and prior to the year 1903, it was common to make horns for phonographs of different materials such as metal, wood, celluloid, paper, glass, etc. [82] The bell-shaped horn was well known, and so was the construction of the bell-shaped horn from tapering strips joined together at their edges so as to form longitudinal ribs or seams extending from one end of the horn to the other, said tapering strips curving outwardly from the small end to the large end of the horn. The method of joining the edges of the tapering strips together necessarily depended more or less upon the material of which the tapering strips consisted. It

was common practice for many years prior to 1903, in this country, to substitute one material for another in the making of horns for phonographs and similar instruments and to join the edges of the strips of material forming the horn in any of the many well-known ways for so doing, all of which ways were equivalent to one another. If the strips of which the horn was composed consisted of wood, paper or celluloid an adhesive substance might be used which substance was in no way different from the solder employed when the strips were of metal. An examination of the French, English and United States patents adduced by defendant's counsel in this suit and shown to me by him will illustrate what I mean without the necessity of my referring with any particularity to any one or more of the patents. I did not apply for a patent on the Kaiser horn, and sought protection therefor by registration of my trademark only, because I was advised by my attorney at the time that, in view of the state of the art, it was not patentable invention to construct a horn of tapering strips secured together at their edges in the manner described, so as to form longitudinal seams or ribs reinforcing and strengthening the horn, the said strips curving gradually outwardly from the small end to the large end of the horn so that the horn was narrower at the small end and flaring at the large end and of bell shape, [83] the horn being made of a tough leather-like paper instead of the usual metal employed in order to improve the sound-producing qualities of the horn.

As appears from the statement in my said trademark, I put the Kaiser horn upon the market in 1897, as early as September 1, 1897, in connection with said trademark. I manufactured the Kaiser horns and sold them through the Judge Publishing Company, and later I sold them through the firm of Harms, Kaiser & Hagen and thereafter. The Kaiser horn was very popular, and I sold all that I could make. About the year 1901 E. A. Schoettel put upon the market an imitation of the Kaiser horn. It was called the "Mega" horn. I annex hereto a copy of Schoettel's advertisement of the Mega horn, which appeared on March 15, 1905, in Vol. 1, No. 3 of the Talking Machine World. Schoettel described and claimed a process for manufacturing this horn upon an application filed February 18, 1904, which resulted in patent No. 769,410 issued September 6, 1904. Mr. Louis Hicks, counsel for defendant herein, has exhibited to me a horn which is of precisely the same construction as the Kaiser horn and which he informs me was sent to him by Mr. Walter H. Miller. I cannot state whether this horn is a Kaiser horn or one of Schoettel's horns. I know that on the inside of this horn, on the flaring end thereof, appear the words "Patent Improvement Pending," and these words lead me to believe that it is a horn that was put out by Schoettel. I annex hereto a photograph of said horn designated as "Schoettel's Mega Horn or Kaiser Horn." I made the Kaiser horn in the manner shown in the Schoettel patent No. 769,410 but long prior to Schoettel. Everyone familiar with the phonograph trade in the

United States prior to 1900 knows the Kaiser horn.
[84]

My attention has been directed by defendant's counsel, Mr. Hicks, to patent No. 534,543, granted February 19, 1895, to Emile Berliner. Referring to fig. 3 of that patent, it will be seen that the drawing shows a bell-shaped horn for a phonograph of substantially the same shape as my Kaiser horn. At the flaring end of the horn are longitudinal ribs upon the outside of the horn, so that the horn shown by Berliner is substantially the same as the horns shown in the Edison catalogue referred to in the moving papers upon this motion, in that all the horns are bell shape and are provided with longitudinal ribs at the flaring end of the horn, such ribs being absent from the other end of the horn for a considerable part of the length of the entire horn, except that in the Edison horns there is a single seam to join together the edges of the metal strip of which said end of the Edison horns is made. I have seen the Berliner horns shown in fig. 3 of Berliner patent No. 534,543. They were made of the composition used for making flat disk records. For this reason there were no edges to be joined together in the construction of the horn as would have been the case had the horn been made of tapering strips of paper, as with the Kaiser horn, or of metal.

I have stated above that it has been common to make horns for phonographs and similar machines out of wood and celluloid and other like material. This statement is corroborated by the United States, French and English patents adduced by defendant's

counsel. Reference to French patent No. 318,742 of February 17, 1902, discloses in figs. 8 and 14, for example, horns made of tapering strips secured together at their edges in a manner to form longitudinal ribs either on the outside or on the inside of the horn. Eight tapering strips are shown in fig. 8, [85] and the patent describes a horn made of twelve such strips. In fig. 8 the horn is shown as an octagonal pyramid, while in fig. 14 it is bell-shaped. The French patent states that wood is substituted for metal, just as I substituted tough paper for metal when I made the Kaiser horn in 1895. I see no difference between the metal horn of the Nielsen patent in suit and the wooden horn of the said French patent to Turpin. Horns of wood have continuously been used in this country and are in use to-day. I have in my possession a wooden horn which I purchased about the year 1907. It is called the "Eureka" phonograph horn and bears upon the outside of one of the tapering wooden strips of which it is made the name "General Phonograph Supply Company" with the registered trademark of that company and "Patent No. 829,066" with other words. This wooden horn is one of excellent sound-producing quality. I purchased it from a dealer in Warren Street, New York City, probably the General Phonograph Supply Company. It was made by Edward B. Jordan Company Cabinet Works, 129 Degraw Street, Brooklyn, N. Y. The horn was sold to the public at the time I made the purchase for fifteen dollars (\$15.00). The horn was made by the Jordan Company exclusively for the dealer in Warren Street

from whom I purchased the one produced by me. It is a first-class horn, particularly good in rendering the detail of the phonograph record and the reproduction of sound is of a mellow, musical quality. The lines of the horn are good, being like the lines of the Kaiser horn and of the bell-shaped horn of the French patent to Turpin. The horn is composed of tapering strips of wood extending from one end of the horn to the other, joined together at their edges by means of longitudinal ribs of wood extending from one end of the horn to the other, said longitudinal ribs being provided [86] with recesses or grooves upon each side to receive the adjacent edges of the tapering strips, in precisely the manner employed in joining together the tapering strips of paper, celluloid or other like material when metal strips or clips have been employed for that purpose as shown by many patents of the prior art, for example, fig. 5 of British patent No. 22,612 of 1899 to Hogan, figs. 5 and 6 of British patent No. 7,594, of 1900 to Hogan, fig. 2 of British patent No. 9,727 of 1901 to Runge, figs. 3 and 4 of British patent No. 22,273 of 1901 to Runge, fig. 7 of British patent No. 17,786 of 1902 to Fairbrother, figs. 2, 3 and 5 of French patent No. 331,566 of April 28, 1903 to Hollingsworth, fig. 2 of French patent No. 321,507 of May 28, 1902, to Runge. The tapering strips composing this "Eureka" wooden horn curve gradually outwardly from the small end to the large end of the horn so that the horn is flaring at its large end and of a bell shape. The inside of the horn is handsomely finished by what is called marquetry finish. I annex

hereto a photograph of the said Eureka horn.

Reference to United States patent No. 453,798 of June 9, 1891, and No. 491,421 of February 7, 1893, to A. Gersdorff will show that the making of a funnel or horn of tapering strips of metal joined together at their edges by the well-known tinsmith's or lock seam, the tapering strips extending from one end of the horn to the other and gradually curving outwardly so as to make the funnel or horn flaring at its large end and of bell shape was well-known. In the Gersdorff patent No. 491,421, the construction [87] of the horn or funnel is described at page 1, lines 79-87, as follows:

"The sections are united together along their side edges through the body of the funnel by bending the same to form flanges and by interlocking and soldering the flanges together, thus forming the longitudinal seams; but in the nozzle the sections are united by soldering instead of interlocking the flanges, thus forming smooth seams in the nozzle."

Gersdorff further describes the construction of his funnel or horn as follows (p. 1, lines 36-49):—

"My funnel A is formed from two or more—preferably three—sections *a* and *a* which are united upon longitudinal lines so that each section extends from the upper end to the lower end of the funnel and constitutes a part of the body and a part of the nozzle of the same, as shown. The joints or seams are all lengthwise of the funnel, and in the direction of the greatest strain—transversely—said funnel presents only

solid metal which is strengthened by its curve form and by said seams, and is capable of resisting successfully a much greater force than would ever be exerted by any proper use."

In his claims Gersdorff specifies "as a new article of manufacture, a funnel made of longitudinal sections united together by longitudinal seams."

These patents to Gersdorff in themselves show that the horn of the Nielsen patent in suit was entirely lacking in novelty, since Nielsen did nothing more than to construct the Gersdorff funnel or horn. The theory that the ribs formed by the longitudinal seams of a horn, such as the seams of the Gersdorff funnel or horn, would improve the sound-producing qualities of the horn was known in the phonograph art long prior to the date of the alleged invention of the horn of the Nielsen patent in suit. This clearly appears from British patent No. 22,612 of 1899 to Hogan (p. 2, lines 20-23), where it is stated that the metal strip *h* of fig. 5 not only serves as a means of joining the edges of the sheet material together, but "also serves to augment and improve [88] the sounding qualities of the trumpet"; and in French patent No. 321,507 of May 28, 1902, to Runge, which shows a similar metal clip or strip (see *G'* of figs. 1 and 2), and states that a second reinforcement, instead of being in the form of a crease, can assume the form of a metal clip or strip fixed upon the exterior or the interior of the horn and that more than two reinforcements can be employed (p. 1, line 62 to p. 2, line 2). This means that several longitudinal ribs, such as *G'*, can be employed to secure together the

edges of tapering strips and thereby reinforce the horn as well as to improve the sound-giving qualities of the horn as clearly set forth in claim 1 of this French patent which, translated, reads as follows:

“1. In a graphophone or talking machine, a horn having two or more longitudinal reinforcements serving to improve its sound-producing qualities.”

Belgian patent No. 163,518 of May 27, 1902, to Runge also sets forth that the horn therein described has two or more longitudinal reinforcements to improve its sonorous qualities. In other words, it was known prior to the date of the alleged invention of the horn of the Nielsen patent in suit that if the funnel or horn of the Gersdorff patents was used in the reproducing of sound by means of a phonograph the longitudinal ribs or seams of the Gersdorff funnel or horn would improve the sound-giving qualities thereof.

About three years ago William H. Locke, Jr., called upon me in the city of New York and asked my opinion as to whether there was any difference in the sound-producing qualities of the Nielsen horn of the patent in suit and the well-known black and gold horn which is provided with only [89] one longitudinal rib. In other words, he asked me whether there was any difference in the sound-producing qualities of the two horns shown in the advertisement of Hawthorne & Sheble Mfg. Co., appearing in Vol. 1, No. 1 of the Talking Machine World for January 18, 1909, a copy of which I am informed is annexed to the affidavit of Mr. Ellsworth A. Hawthorne in this suit,

the upper horn being the black and gold horn and the lower horn being a horn of the Hawthorne & Sheble Mfg. Co., similar to the Nielsen horn of the patent in suit. The William H. Locke, Jr., referred to is the William H. Locke, Jr., of the Searchlight Horn Company, the plaintiff in this suit. I could see no difference between the sound-producing qualities of the two horns; and it is my opinion, based upon my long experience in this art, that it is immaterial whether a horn be provided with one or two or more longitudinal ribs and whether the ribs be on the inside or on the outside or upon the inside and upon the outside of the horn, so far as the sound-producing qualities of the horn are concerned.

The manufacture of horns for phonographs in this country from tapering strips of metal joined together at their edges by the ordinary tinsmith's or lock seam forming longitudinal ribs upon the outside of the horn is as old as the phonograph art itself. Defendant's counsel, Mr. Hicks, has exhibited to me two metal horns, one of which is about twenty-one inches long and the other of which is similar, except that about six inches has been cut off at the smaller end to adapt it, as I am informed, for use as a megaphone in making announcements at the commencement of the recording of a sound record. These two horns are made up of two tapering strips of metal united at their edges [90] by the usual lock seam forming longitudinal ribs upon the outside of the horn. These two horns are provided with flaring portions at the large end of the horn and are also made of two tapering strips joined together at their edges by lock seams

forming longitudinal ribs upon the outside of the large end of the horn. The flaring portions are joined to the other portions of the horns by similar lock seams forming ribs extending around the circumference of the horn, where the handles of the horns are. Such horns were used for reproducing sound from phonographs prior to the year 1895. Photographs of these horns are annexed to the affidavit of Walter H. Miller on behalf of defendant herein. Reference to a book entitled "A Complete Manual of the Edison Phonograph," by George E. Tewksbury, published at Newark, New Jersey, in 1897, will show, on page 70 thereof, an illustration of a number of phonograph horns of different shapes, in which the lock seam was employed to join together the adjacent edges of the tapering strips of which the horns of metal were made. In the center of the illustration, however, appears one of my Kaiser horns. Some of the horns shown were made up of four tapering strips, each tapering strip forming the side of a pyramid so that the horn was provided with four longitudinal ribs. The flaring large end of the large horn at the top of the illustration was composed of at least three tapering strips joined together at their edges by lock seams. The small metal horns of the illustration were, apparently, metal horns composed of two tapering strips joined together at their edges by lock seams to form the flaring end of the horn and of two tapering strips similarly joined to form the other end of the horn, in the manner above described.

Metal horns for phonographs have been manufactured [91] for many years, from a period long

prior to 1900, by manufacturers of sheet metal goods, so that the knowledge of the art of making goods from sheet metal has always been a part of the knowledge of the art of making horns for phonographs. I recollect that while I was with the Universal Talking Machine Company a number of cornice makers, during a strike on their part, turned their attention to making horns for phonographs. Several of the well-known manufacturers of sheet metal goods in the east have manufactured metal horns for phonographs.

JOHN KAISER.

Subscribed and sworn to before me this 6th day of June, 1913.

[Seal]

JOHN J. V. BURKE,

Notary Public, New York County. No. 344

[92]

TRADE-MARK.

No. 31,772.

Registered July 5, 1898.

JOHN KAISER.

HORNS USED IN CONNECTION WITH SOUND PRODUCING DEVICES.

(Application filed Apr. 14, 1898.)

The "Kaiser Horn"



Witnesses
Edward R. ...
M. F. Keating

John Kaiser
 By his Attorney
Charles J. Kintner

UNITED STATES PATENT OFFICE.

JOHN KAISER, OF NEW YORK, N. Y.

TRADE-MARK FOR HORNS USED IN CONNECTION WITH SOUND-PRODUCING DEVICES.

STATEMENT and DECLARATION of Trade-Mark No. 31,772, registered July 5, 1898.

Application filed April 14, 1898.

STATEMENT.

To all whom it may concern:

Be it known that I, JOHN KAISER, a citizen of the United States, residing at New York, in the county of New York and State of New York, and doing business at No. 110 Fifth avenue, in said city, have adopted for my use a Trade-Mark for Phonograph, Graphophone, or Gramophone Horns, of which the following is a full, clear, and exact specification.

My trade-mark consists of the words "The Kaiser Horn," arranged above a phonograph, graphophone, or gramophone horn suspended from a tripod-support. These have generally been arranged as shown in the accompanying facsimile, which represents a phonograph, graphophone, or gramophone horn yieldingly suspended from a stand. Above the horn appear the words "The Kaiser Horn" in ornamental letters; but the style of lettering is unimportant, the essential feature of my trade-mark being the words "THE KAISER HORN," arranged above a phonograph, gramophone, or graphophone horn suspended from

a tripod-support, substantially as shown in the accompanying facsimile.

This trade-mark I have used continuously in my business since September 1, 1897.

The class of merchandise to which this trade-mark is appropriated is phonograph, graphophone, gramophone, or sound-reproducing devices, and the particular description of goods comprised in said class upon which I use it is the horn or horns utilized in connection with such instruments for magnifying or intensifying the sounds as reproduced.

It has been my practice to apply my trade-mark by printing the same upon suitable labels, generally in black colors, inclosing one of such labels with each horn and its supporting-stand for shipment. I have also used it in catalogues describing the goods and upon letter-heads.

JOHN KAISER.

Witnesses:

C. J. KINTNER,
M. F. KEATING.

DECLARATION.

State of New York, county of New York, ss.

JOHN KAISER, being duly sworn, deposes and says that he is the applicant named in the foregoing statement; that he verily believes that the foregoing statement is true; that he has at this time a right to the use of the trade-mark therein described; that no other person, firm, or corporation has the right to such use, either in the identical form or in any such near resemblance thereto as might be calculated to deceive; that it is used by him in commerce between the United States and

foreign nations or Indian tribes, and particularly with Canada and Great Britain; and that the description and facsimiles presented for record truly represent the trade-mark sought to be registered.

JOHN KAISER.

Sworn and subscribed to before me this 13th day of April, 1898.

[L. s.] CHARLES J. KINTNER,
Notary Public, N. Y. Co., New York.



Kaiser Horn 1898.

THE TALKING MACHINE WORLD.

9

WILL REPLACE CHEAP PIANO.

This is the Mission of the Talking Machine—Its Wonderful Progress and Possibilities.

By H. H. BISHLEY JUNIOR, LONDON, ENGL.

Is the talking machine a nice day's wonder, or is it to take a permanent place as a means of providing music in houses where music of any other kind is impossible? The question is one which is frequently asked, not only by members of the public, but even—perhaps it should be true to say especially—by those engaged in the talking machine trade. The answers given by different people vary considerably, and although probably the general opinion is that the talking machine has come to stay, there are not wanting those who believe that, in a few years' time, its popularity will, practically speaking, be a thing of the past.

There can be little doubt that, rapid as has been the progress of the graphophone during the past few years, we are on the eve of still greater developments in the near future. It is not to be expected that we are yet anywhere near finally in the recording and reproduction of sounds; in all probability the next few years will see as great an advance as has been achieved during the past decade. The graphophone of today, far ahead as it is of earlier crude efforts, is probably just as far behind the machines which will be selling ten or fifteen years hence. One of the main obstacles to the introduction of the graphophone into many homes is, no doubt, the popular impression that the talking machine is still only a scientific toy, and that anything to which the generic name of "phonograph" can be applied is something capable of emitting only wailed screeches and scrawlings without the slightest pretensions to musical quality of tone. People who hold this idea are familiar to everyone engaged in the talking machine trade, and if there is one thing more amusing than their ignorance it is their wonder and astonishment when they hear for the first time a really up-to-date graphophone. The work of converting this large section of the community is progressing, but much yet remains to be done.

I believe that in the near future the graphophone is destined to replace, to a very great extent, the cheap piano which is to-day so common a feature in the homes of the lower middle and upper working classes. Anyone engaged in selling talking machines on installment terms is aware that one of the commonest (and best) guarantees of the bona fide of a would-be purchaser is the production of a file of receipts from some other house dealing on installment terms. A frequent purchase in this manner is a piano running to £15 or so, which, probably, is incapable of affording anything approaching music and will never be played on by any single member of the family to which it belongs.

In view of the possibilities latent in the graphophone, I do not believe this kind of thing is likely to go on. The music to be obtained from the graphophone is better than could be obtained from a piano of the type I have just mentioned, even if there were anyone in the house who could play it, and the selection of available music is, of course, infinitely greater. Even in addition to the fifteen minutes' piano of one of the numerous types of automatic player will not give the variety of results to be obtained from a high class graphophone. In the absence of the automatic player, to attain even very moderate proficiency demands an amount of time and hard work which can only be rarely devoted to the study of music by those who have to work hard for their daily bread.

In the vast bulk of middle class homes, moreover, the gift of musical executive ability is either absent or circumstances render it certain that it can never be developed. The graphophone, on the other hand, affords to such homes as these an inexhaustible supply of music of any kind without the necessity of constant study or practice. It is not to be supposed that this point will be overlooked, and it is beyond question one which will have a potent influence on the future of the talking machine.—Columbia Record.

BUSY TIMES IN PHILADELPHIA.

Victor Co. to Remove Their Offices to Camden—Many New Records Now Under Way—Some Distinguished Owners of Victor Machines.

(Special to The Talking Machine World.) Philadelphia, Pa., March 12, 1905.

The Victor Talking Machine Co. have their plant in Camden running as good as before the fire. They are able to do more work now than ever before, as they have installed two additional presses. They are a little back in their orders, but expect, by the end of this month, to be in excellent shape. By the first of April, and thereafter, they will turn out more records than they have ever done before. The business of the firm has been growing with great rapidity, and it will facilitate matters very much when they will be ready to install their offices in connection with the factory in Camden, removing from the Commonwealth Trust building, this city. This move will be made the last Saturday in April, and the firm will be ready to do business in Camden on the 1st day of May.

Eldridge R. Johnson, president of the Victor Co., is at present in St. Augustine, Fla., as well as A. C. Middleton, secretary of the company. Mr. Johnson has been down for some weeks, but Mr. Middleton only joined him last week. They will both be here for five or six weeks.

The firm are branching out considerably. They are establishing new agencies all the time. One of their most recent is the firm of W. H. & L. C. Wolf, of Altoona, Pa., who have been ordering heavily.

When the firm move their offices to Camden they will also remove their laboratory at present located at 1424 South 10th street. This is where their record laboratory is located.

They have been getting out new records rapidly. Among these new ones are a number representing Arthur Pryor's Orchestra in classic selections. It may interest owners of Victors to know that the following rulers possess Victor talking machines and a collection of records: Queen Alexandra of England, King Carlos of Portugal, King Alfonso of Spain, King George of Greece, Pope Pius X, the Sultan of Turkey and President Diaz of Mexico. For the last named ruler the firm have just completed the finest machine ever built, and President Diaz's appreciation of it is shown by an autograph letter which the firm have received.

Among the recent great singers who have sung to the Victor machine are the following: M. Pol Planco, bass; Mrs. Louise Homer, contralto;

Mrs. Antonio Scotti, baritone; M. Marcel Journet, bass; and M. Francisco Nello, tenor.

THE TALKING MACHINE ALARM CLOCK.

Judging by the alacrity with which the average possessor of a talking machine is willing to exhibit, and to the persistency with which he will operate the machine from early morning to late at night, it seems quite probable that the inventor of the graphophone alarm clock will have no difficulty in finding a ready market for his device among devotees of the talking machine. It is a comparatively easy matter to control a talking machine record by means of an alarm clock register, and to amplify the functions of the alarm to indicate the hours, thus substituting the striking clock or the use of a night lamp to indicate the time. There is something modern about being called by a voice in the morning instead of being aroused by the mechanical toll. Moreover the phonographic record that is set in action can be arranged so that any number of alarms can be given at intervals.

COMBINATION TALKING MACHINE AND MUSIC BOX.

The Miraphone, which is a combination talking machine and music box is one of the novelties which is rapidly becoming popular. It combines the variety obtained from the talking machines with the musical tones of the music box, and appeals to the most varied tastes for music



and entertainment. Its fine mechanism is noiseless and runs with perfect regularity.

To use the Miraphone as a talking machine only requires the removal of the steel time sheet, adjusting turn-table, on revolving cone, and setting up the metal arm supporting the horn and soundbox. The cabinet is of oak, mahogany and highly polished. Talking machine dealers will find it a valuable acquisition to their stock. The Miraphone is manufactured by the Jacot Music Box Co., 39 Union Square, New York.

THE HORN THAT PROVES ITS WORTH

THE "MEGA"

IT'S PAPER

THE IDEAL HORN for the true music lover and for the discriminating purchaser.

A HIGH GRADE, DISTINCTIVE PRODUCT

Built on correct acoustic principles and possessing a rare timbre not found in other horns.

"MEGA" TRUMPET.

PURE, SWEET, SONOROUS.

TRADE-MARK

"MEGA" FLUWEL.

GRACEFUL IN SHAPE.

RIGHT IN COLORING.

SUBSTANTIAL.

EASED GLACE FINISH.

GUARANTEED TO STAND IN ANY CLIMATE.

If you cannot obtain the "Mega" from your jobber, write us direct and forward your jobber's name.

DO THESE ADVANTAGES APPEAL TO YOU?

SAMPLE HORN LAY ROOM.

32 EAST 14th STREET.

NEW YORK CITY

in charge of E. KAISER, Local Representative.

Prices on all "Mega" horns are reduced. The "Mega" does not tarnish, dent, or become shabby. There is no depreciation in value in carrying a stock of "Mega's."



Makers. E. A. & A. G. SCHOETTEL

BROAD STREET, MASPETH, QUEENS CO., N. Y.



Schoettels Megahorn or Kaiser Horn



EUREKA MARQUETRY-FINISH HORN



[Affidavit of Walter H. Miller.]

District Court of the United States, Northern District of California, Second Division.

SEARCHLIGHT HORN COMPANY,
Plaintiff,

vs.

PACIFIC PHONOGRAPH COMPANY,
Defendant.

SEARCHLIGHT HORN COMPANY,
Plaintiff,

vs.

BABSON BROS., INC.,
Defendant.

State of New York,
County of New York,—ss.

Walter H. Miller, being duly sworn, deposes and says:

I am over the age of twenty-one years and reside at Orange, New Jersey. I have been engaged in the talking machine business continuously since the year 1888 when the North American Phonograph Company was organized. Beginning in 1888 I assisted Mr. Thomas A. Edison in recording and reproducing sound records by means of a phonograph. I did the same work for the North American Phonograph Company and continued with that company until it went into the hands of a receiver in the year 1894 when I became a member of the [99] firm of Walcutt, Miller & Company, which firm did business at 110 East 14 Street and then at 53 East 11 Street, in

the city of New York. The firm of Walcutt, Miller & Company was dissolved about the beginning of the year 1896. I then became connected with the Phonograph Record and Supply Company and continued with that company until I entered the employ of the National Phonograph Company in the latter part of 1896 or the early part of 1897, at West Orange, New Jersey. Since that time I have been connected with the recording department of the National Phonograph Company and its successor, Thomas A. Edison, Inc. At present I am the manager of the recording department of Thomas A. Edison, Inc. All of the companies and firms above mentioned, with which I have been connected, were engaged in the talking machine business.

When the National Phonograph Company began to make and sell sound records, which was in the latter part of 1896 or the early part of 1897, at West Orange, New Jersey, we employed for the making of announcements at the beginning of the recording of the phonograph record a brass horn, which had then been on the market for several years. The horn referred to was on the market in 1892 when I was employed by the North American Phonograph Company. I still have the horn employed by the National Phonograph Company for making announcements at the beginning of the recording of phonograph records in the latter part of 1896 or the early part of 1897. The horn was originally about twenty-one inches long. It was a horn adapted for use and was generally used in the reproduction of sound from a phonograph record by means of a phonograph; but

in order to use it as a megaphone for the making of the announcements aforesaid we cut off about six inches from the small end of the horn. I [100] have in my possession a like horn which shows exactly what the horn first mentioned was before we cut off six inches from the small end thereof. These two horns I have turned over to Mr. Hicks, counsel for defendants in these suits, and I hereto annex photographs of the two horns. Reference to the photographs and to the horns themselves shows that each horn was about twenty-one inches long, narrow at the small end and wide or flaring at the large end and of bell shape. Each horn consisted of two tapering strips of brass, joined together at their edges by the ordinary tinsmith's or lock seams forming two longitudinal ribs. In making the lock seams, the pressure was so applied that the seams were formed on the outside rather than upon the inside of the horn. The flaring end of the horn was also composed of two tapering strips of brass joined together at their edges by lock seams so as to form longitudinal ribs upon the outside thereof. The horn consisted of the two parts thus described, to wit, the flaring part of the horn and the remaining part of the horn; and the two parts were joined together by a similar lock seam which formed a rib extending around the circumference of the horn. The two parts of the horn were so joined together that the longitudinal ribs and the tapering strips of brass of the flaring part of the horn formed continuations of the longitudinal ribs and tapering strips of the other part of the horn. In other words, each of the said two horns may be de-

scribed as consisting of two tapering strips of brass, extending from one end of the horn to the other and joined together at their edges by lock seams forming longitudinal ribs on the outside of the horn, which extended from one end of the horn to the other. [101]

The horn which has been cut off at the small end has scratched upon it the initials "E. W. M.," which are the initials of Edward W. Meeker of Orange, New Jersey, who used this particular horn in 1897 for the making of the said announcements. The horn also has attached to it a tag bearing the words "Horn used in Edison Recording Dept. prior to the Spanish War. See Walter Miller," but this tag was not attached to the horn when the photograph thereof hereto annexed was taken. Before Edward W. Meeker used the horn for making announcements it was used for that purpose by one of the members of the band, principally, Louis Atz, employed by the National Phonograph Company, for the making of phonograph records. Edward W. Meeker was employed by the National Phonograph Company to make announcements about the spring of 1897, and thereupon and thereafter he employed the said horn for that purpose instead of Atz or any other member of the band. The making of these phonograph records was under my direction; and so was, therefore, the use of the said horn for the making of the announcements. I therefore know that the horn referred to was in existence and in use, as described, in the year 1897. I also know that such horns were on the market in the United States and were sold for use and

were used in reproducing sound from phonograph records as early as the year 1892, when I was with the North American Phonograph Company.

I have made a practical study of the construction and use of horns for phonographs ever since the year 1888. The talking machine art has used metal, wood, paper, glass, celluloid and other materials as desired for the construction of phonograph horns. The idea that stiffening of the horn, as by means of a longitudinal joint formed by joining together the edges of the sheet material of which the horn was made, [102] would improve the sound-producing qualities of the horn was an idea that is old in the art. It was set forth, for instance, in British patent No. 22,612 of 1889 to Hogan, at page 2, lines 20-22; in U. S. patent No. 632,015 of August 29, 1889, to Hogan, at page 1, lines 83-87; in French patent No. 321,507 of May 28, 1902, to Runge, at page 1, lines 1-4 and in claim 1; and in Belgian patent No. 163,518 of May 27, 1902, to Runge.

I was familiar with the well-known Kaiser horn prior to the year 1900. The Kaiser horn consisted of tapering strips or tough leather-like paper, secured together at their edges so as to form longitudinal ribs, the tapering strips of paper and longitudinal ribs extending from one end of the horn to the other, and strips curving outwardly gradually so as to make a horn narrow at the small end and flaring at the large end and of bell shape. Horns for phonographs have also been made of wood and other suitable material. French patent No. 318,742 of February 17, 1902, to Turpin shows, in fig. 8, a

horn composed of tapering strips of wood, secured together at their edges by longitudinal ribs of wood or metal, either on the inside or on the outside of the horn (See figs. 9, 10, 12 and 13) and shows, also, in fig. 14, that horns thus constructed may be of a bell shape, like the Kaiser horn, as well of octagonal shape as shown in fig. 8. The French patent to Turpin also sets forth, at p. 3, lines 83-103, that the horn may be made of twelve tapering strips, some of which may be of wood, some of metal and some of glass, which, of course, are to be joined together at their edges by the longitudinal ribs described in the French patent to Turpin, and which may be of bell shape as well as of the shape of a pyramid of twelve sides according to the teachings of the patent. Reference to the illustration on [103] page 70 of a book entitled "A Complete Manual of the Edison Phonograph," by George E. Tewksbury, published at Newark, New Jersey, in 1897, by the United States Phonograph Company, will show that when phonograph horns were made of metal some appropriate tinsmith's seam, such as the lock seam was used to join together the edges of the tapering strips of metal making up the horn. Makers of horns have employed appropriate means for joining together the edges of the parts composing the horns according to whether the horns were made of metal, wood, paper or other suitable sheet material. If metal was used solder might be employed; if wood was used longitudinal ribs of wood or metal and glue or other suitable adhesive material might be employed. The patents of the prior art adduced by Mr. Hicks, de-

fendant's counsel, show that all the well-known methods of joining together adjacent edges of tapering strips of sheet material were employed. British patent No. 22,612 of 1889 to Hogan shows, in fig. 5, that two strips of metal bent to receive the edges of the adjacent tapering strips and soldered together were employed. British patent No. 7,594 of 1900 to Hogan shows, in fig. 5, that a single strip of metal bent into the shape of a flattened letter S so as to form two receiving sockets may be employed and shows, in fig. 6, that a single strip of metal bent in a different manner so as to form two receiving sockets may be employed. British patent No. 9, 727 of 1901 to Runge shows, in fig. 2, the use of two strips of metal each bent in U shape and soldered together. British patent No. 22,773 of 1901 shows, in figs. 2 and 3, the like use of two U-shaped strips of metal soldered together. British patent No. 17,786 of 1902 to Fairbrother shows, in figs. 6 and 7, that a butt seam (fig. 6) and a lock seam (fig. 7) may be employed in joining together the [104] edges of tapering strips of sheet material such as celluloid, paper, or the like. British patent No. 20,567 of 1902 to Tourtel shows, in fig. 4 and page 3, lines 40-48, that in a horn for phonographs, made of any suitable material the edges of the tapering strips may be so bent and overlapped so as to form a longitudinal rib strengthening and reinforcing the horn.

The formation of longitudinal ribs in the joining together of tapering strips of suitable material employed in the making of a horn for phonographs, in order to strengthen and reinforce the horn and to im-

prove the sound-giving qualities thereof is also shown in the following patents:

French patent No. 318,742 of February 17, 1902, to Turpin, figs. 8, 9, 10, 12, 13 and 14.

French patent No. 321,507 of May 28, 1902, to Runge, figs. 1 and 2 and page 1, lines 1-4, and page 2, claim 1.

French patent No. 331,566 of April 28, 1903, to Hollingsworth, figs. 1-5, p. 1, line 60 to p. 2, line 13.

Belgian patent No. 163,518 of May 27, 1902, to Runge.

The same construction is shown in the following letters patent of the United States:

No. 491,421 of February 7, 1893, to Gersdorff, fig. 2; p. 1, lines 36-49 and lines 79-87; p. 2, claims 1 and 2.

No. 632,015 of August 29, 1899, to Hogan, fig. 5; p. 1, lines 82-87; claims 2 and 3.

No. 769,410, of September 6, 1904, to Schoettel, figs. 1-4; page 1, lines 32-39; claims 1-4. [105]

No. 647,147 of April 10, 1900, to Myers, fig. 4; p. 2, lines 46-75.

No. 748,969 of January 5, 1904, to Melville, fig. 1; p. 1, lines 36-56 and lines 91-98; claim 3.

The foregoing British, French, Belgian and United States patents specifically state and show that the longitudinal ribs formed by joining together the edges of the tapering strips of suitable material composing the horn have the effect of strengthening and reinforcing the horn, while at least four of the patents above specified state that the longitudinal ribs not only strengthen and reinforce the horn but also

improve the sound-producing qualities of the horn.

The following patents of the prior art show that the making of a horn for phonographs by joining together at their edges a plurality of tapering strips of suitable material, extending from one end of the horn to the other, was well known in the art long prior to the date of Nielsen's alleged invention of the patent in suit. These same patents show, as above pointed out, that longitudinal ribs extending from one end of the horn to the other result from such joining together of the tapering strips.

British patent No. 22,273 of 1901 to Runge sets forth, at p. 1, lines 18-20 and p. 2, lines 19-21, that a series of metal strips such as the metal strip B of figs. 2 and 3 may be employed to stiffen or strengthen the horn. The metal strip B consists of two U-shaped metal strips provided with two sockets for receiving the adjacent edges of the tapering strips forming the horn and soldered together. The patent states that the crease or fold C shown in fig. 2 need not be employed and that the metal strip B or a series of them [106] may be substituted therefor. Inasmuch as the metal strip B is formed in the manner above stated, it is obvious that, in the employment of a series of metal Strips B, the horn must necessarily be composed of a series of separate tapering strips of suitable material. In his corresponding French patent No. 321,507 of May 28, 1902, Runge specifically states that the metal strips G' of figs. 1 and 2, of which two or more may be employed, not only serve to strengthen and reinforce the horn but also serve to improve the sound-producing qualities of the

horn (See p. 1, lines 1-4; p. 1, line 61-p. 2, line 2; and claim 1). In his Belgian patent No. 163,518 of May 27, 1902, Runge makes the same showing. In these patents Runge says that he makes his horn of sheet material, for example, celluloid or the like. This necessarily includes such sheet material as metal, for metal, celluloid, wood, paper and other like sheet material had long been known as equivalent materials for the making of horns for phonographs and other like uses. I regard these British, French and Belgian patents as complete anticipations of the Nielsen patent in suit.

British patent No. 20,146 of 1902 to Villy shows, in figs. 1, 2 and 5, a horn of which the large end is composed of a plurality (about twelve) of tapering curved strips of suitable sheet material, joined together at their edges so as to form longitudinal ribs. The small end of the horn appears to be composed of a single piece of sheet material. In this patent of the prior art we have the construction of the Edison straight horn and the Edison Cygnet horn charged with infringement in these suits since the large ends of the Edison horns are composed of a plurality of curved tapering strips joined together at their edges, while the small end of the horns is composed of a single tapering strip of sheet material. The shape of the Villy horn and the [107] shape of the Edison straight horn are practically identical. The Edison Cygnet horn has a long curved small end of the horn, the curve being like the neck of a swan. Nielsen does not show this construction in the patent in suit. Villy specifies that the tapering strips com-

posing the large end of his horn form longitudinal ribs, for he says (p. 3, lines 16-18):

“The angles formed by the meeting of the hinged segments when extended form, as it were, ribs giving rigidity to the trumpet form.”

United States patent No. 763,808 to Sturges, of June 28, 1904, shows a horn composed of sixteen tapering strips of any suitable material. The edges of the tapering strips are beveled (See fig. 2). Sturges states that when these beveled edges come together they produce a strong and durable horn (p. 1, lines 53-58). It is apparent from fig. 2 that the beveled edges produce longitudinal ribs upon the outside of the horn, extending from one end of the horn to the other as do the tapering strips. The patent to Sturges is like the British patent to Villy in that each points out that the angles formed by the adjacent edges of the tapering strips of sheet material form longitudinal ribs strengthening the horn.

British patent No. 5,186 of 1903, to Cockman shows, in figs. 1 and 2, a horn for phonographs, composed of six tapering strips or sections. Cockman states he prefers to use a particular kind of wood instead of sheet metal, paper or ordinary wood (p. 1, lines 1-20; p. 1, line 32-p. 2, line 7). This patent is one of the many patents of the prior art which show the equivalency of sheet metal, paper, celluloid, wood and the like. Cockman says that although he shows six tapering strips in fig. 2 more than six or less than six may be used (p. 2, line 20). He also says that although he has [108] shown curved strips to produce a trumpet of circular section, they may be

flat, thereby producing a trumpet with any desired number of sides (p. 2, lines 21-23). Since Cockman prefers to make his horn of a particular kind of wood instead of sheet metal, he says that he glues the tapering strips of wood together at their edges (p. 2, lines 19-20). He necessarily forms longitudinal seams or ribs upon the outside of the horn, extending from one end of the horn to the other.

United States Patent No. 491,421, of February 7, 1893, to Gersdorff shows, in fig. 2, a funnel or horn composed of three tapering strips of metal, extending from one end of the horn to the other, and joined together at their edges by lock seams. The tapering strips are curved outwardly from the small end of the horn to the large end of the horn, and the horn is bell shape. Gersdorff says that the curved form of the horn and the said lock seams strengthen the horn (p. 1, lines 36-49). He points out that the seams are longitudinal seams, and he describes just how the lock seam is formed (p. 1, lines 79-87). He says that he forms his funnel or horn from "two or more—preferably three"—tapering sections or strips of metal. He describes the construction in claims 1 and 2 of his patent. The three claims of the Nielsen patent read upon Gersdorff's funnel or horn and are, therefore, anticipated, unless the Court limits the claim of the Nielsen patent to the specific construction shown—namely, "tapering strips provided at their edges with longitudinal outwardly directed flanges," which are not employed in the Edison horns and which, however, were very old in the art of making horns for phonographs and

other like instruments, as shown, for example, in British patent No. 17,786 of [109] 1902, to Fairbrother, fig. 6; and United States patents No. 34,907 of August 6, 1901, to McVeety et al., fig. 3; No. 165,912 of July 27, 1875, to Barnard, fig. 5; No. 362,107 of May 3, 1887, to Penfield, figs. 3-6; No. 406,332 of July 2, 1889, to Bayles, fig. 3; No. 409,196 of August 20, 1889, to Hart, fig. 8; No. 699,928 of May 13, 1902, to McVeety et al., figs. 2 and 3.

The well-known Kaiser horn of the prior art, mentioned above, of which a photograph is annexed to the affidavit of John Kaiser in these suits, was composed of twelve tapering strips of sheet material, joined at their edges so as to form longitudinal ribs. The outline of the Kaiser horn is shown in United States trademark No. 31,772 of July 5, 1898, to Kaiser. One method of constructing the Kaiser horn is shown in United States patent No. 769,410 of September 6, 1900, to Schoettel.

United States patent No. 647,147 of April 10, 1900, to Myers, shows in figs. 3 and 4, a horn composed of eight tapering strips of suitable sheet material, joined together at their edges. Myers states (p. 2, lines 46-81) that he prefers a non-metallic material to form his horn; that the tapering strips may be separate and distinct and joined together by a piece of textile fabric; or that he may make the tapering strips of a single piece of suitable sheet material, scoring or creasing the sheet material at intervals so as to divide it into the proper number of tapering strips. This patent shows that in the prior art it was immaterial whether the tapering strips making

up the horn were made by folding or creasing the sheet material or by cutting the sheet material into separate and distinct tapering strips. In either case longitudinal ribs are formed at the edges of the [110] tapering strips, which longitudinal ribs serve to strengthen and reinforce the horn. British patent to Runge No. 22,273 of 1901, shows (see fig. 2 and p. 2, lines 13-21) that a fold or crease C is the equivalent of a longitudinal metal clip or strip B for strengthening and reinforcing the horn and, as shown by Runge's French patent No. 321,507 of May 28, 1902, (figs. 1 and 2; p. 1, lines 1-4; p. 1, lines 62 to page 2, line 2; claim 1) a fold or crease G⁵ and a metal clip or strip G' at opposite sides of the horn may be used to strengthen and reinforce the horn and to improve the sound-giving qualities thereof, or instead of the fold or crease G⁵ a series of metal clips or strips G; two or more may be employed for the same purpose. In this said French patent Runge claims, in a graphophone or talking machine, a horn having two or more longitudinal reinforcements serving to improve the sound-producing qualities of the horn (claim 1). These two or more longitudinal reinforcements may be a series of metal clips or strips G', either with or without a fold or crease G⁵. Every part of the Nielsen patent in suit is thus anticipated.

United States patent No. 770,024 of September 13, 1904, to Ruggiero et al., shows a horn for phonographs or similar machines, composed of tapering strips of suitable material (figs. 1 and 2).

French patent No. 318,742 of February 17, 1902,

to Turpin, shows a horn for phonographs made of eight or twelve tapering strips of wood, joined together at their edges by means of longitudinal ribs of wood or metal either on the inside or on the outside of the horn and shows that the horn may be in the form of a pyramid or bell shape as desired (see figs. 8-14). As pointed out above, Turpin states that he employs wood in preference to metal; but he [111] also states that strips of metal may be employed in connection with strips of wood. Since it was well known that either metal or wood or any other suitable material could be employed in the making of a horn for a phonograph, and since the idea that the longitudinal ribs resulting from the joining together of the tapering strips composing the horn would improve the sound-producing qualities of the horn, I find no novelty whatever in the Nielsen patent in suit over the French patent to Turpin.

The brass horn of the prior art, produced by E. A. Hawthorne, a photograph of which is annexed to his affidavit in this suit, consisting of five tapering strips of metal, extending from one end of the horn to the other, each strip being curved so as to form a partial cone, and the strips being joined together at their edges so as to form longitudinal ribs extending from one end of the horn to the other is another instance of the manufacture of horns for phonographs in the prior art by the use of a plurality of tapering strips of metal or other suitable material.

The patents and exhibits above referred to show

that horns constructed of tapering strips, in the manner described, were of bell shape. Among the bell-shaped horns of the prior art, constructed of tapering strips, were the Kaiser horn (see United States trademark No. 31,772 of July, 5, 1898, to Kaiser and the photograph of the Kaiser horn of 1898, annexed to Mr. Kaiser's affidavit); the Mega horn of Schoettel (see Schoettel's patent No. 769,410 of September 6, 1904, and the photograph annexed to Mr. Kaiser's affidavit); the two brass horns above described of which photographs are hereto annexed; the horn shown in figs. 1-5 of British patent [112] No. 20,146 of 1902; the horn shown in figs. 14 and 8 of French patent No. 318,742 of February 17, 1902, to Turpin; the horn shown in fig. 1 of French patent No. 321,507 of May 28, 1902, to Runge; the horn shown in figs. 1 and 4 of French patent No. 331,566 of April 28, 1903 to Hollingsworth; the horns shown in figs. 1 and 2 of French patent No. 301,583 of October 9, 1900, to Guerrero; the horns shown in the photograph of the circular of Hawthorne & Sheble Mfg. Co., annexed to the affidavit of Ellsworth A. Hawthorne, herein; the horns shown in the following United States patents:

No. 8,824, of December 7, 1875, to Shirley.

No. 10,235, of September 11, 1877, to Cairns.

No. 491,421, of February 7, 1893, to Gersdorff,
fig. 2.

No. 534,543, of February 1895, to Berliner, fig. 3.

No. 738,342, of September 8, 1903, to Marten, fig. 1.

No. 647,147, of April 10, 1900, to Myers, figs. 1 and
2.

WALTER H. MILLER.

Subscribed and sworn to before me this 5th day of
June, 1913.

[Notary's Seal]

FRANCIS J. McLOUGHLIN,
Notary Public, New York County.

Notary Public, Kings County.

Certificate filed in New York County. [113]





[Affidavit of Edward W. Meeker.]

District Court of the United States, Northern District of California, Second Division.

SEARCHLIGHT HORN COMPANY,

Plaintiff,

vs.

PACIFIC PHONOGRAPH COMPANY,

Defendant.

SEARCHLIGHT HORN COMPANY,

Plaintiff,

vs.

BABSON BROS., INC.,

Defendant.

State of New York,

County of New York,—ss.

Edward W. Meeker, being duly sworn, deposes and says:

I am over the age of twenty-one years and reside at 58 Day Street, Orange, N. J. I have read the annexed affidavit of Walter H. Miller and the statements set forth therein are correct, to the best of my knowledge, information and belief.

About the spring of 1897 I was employed by the National Phonograph Company, and I have continued since that time to be employed by that company and its successor, Thomas A. Edison, Inc., except that on May 1, 1898, I was called away to go to the Spanish-American war. I returned to the [116] plant of the National Phonograph Company at West Orange, N. J. about October, 1898. When I began

my employment with the National Phonograph Company in the spring of 1897 and before I was called away with the United States troops for the Spanish-American war on May 1, 1898, I employed, for the making of announcements at the beginning of the recording of phonograph records, by the employees of the National Phonograph Company, the horn described in the annexed affidavit of Mr. Walter H. Miller, of which a photograph is annexed to said affidavit. The horn referred to is now in the possession of Mr. Hicks, counsel for defendants in the above-entitled suits, and has my initials, "E. W. M." scratched thereon. About six inches have been cut off from the small end of the horn. The horn has been correctly described in the annexed affidavit of Mr. Miller. After my return to the National Phonograph Company in October, 1898, I resumed the use of the said horn for the purpose of making said announcements and continued to use the said horn for such purpose until about 1902, when the National Phonograph Company changed its system of making records. Previously to the time, that is the spring of 1897, when I began to use said horn for making said announcements, said horn had been used by one of the members of the band, principally, Louis Atz, employed by the National Phonograph Company at West Orange, N. J., for the making of announcements. The horn was and is a brass horn. Before it was shortened by cutting off a portion of the small end of the horn it was like the other horn in the possession of Mr. Hicks, of which a photograph is also annexed to the affidavit of Mr. Miller. Such horns

were upon the market in the United States in the spring of 1897 and were [117] manufactured, sold and used as horns for reproducing sound from sound records by means of phonographs. I recognize the horn referred to as the particular horn used by me for the making of said announcements, beginning in the spring of 1897 and the photograph thereof annexed to the affidavit of Mr. Miller is a correct photograph of said horn.

EDWARD W. MEEKER.

Subscribed and sworn to before me this 5th day of June, 1913.

[Notary's Seal]

FRANCIS J. McLOUGHLIN,
Notary Public, County of New York, State of New York.

Notary Public, Kings County.
Certificate filed in New York County. [118]

[**Affidavit of Camillus A. Senne.**]

District Court of the United States, Northern District of California, Second Division.

SEARCHLIGHT HORN COMPANY,
Plaintiff,
vs.
PACIFIC PHONOGRAPH COMPANY,
Defendant.

SEARCHLIGHT HORN COMPANY,

Plaintiff,

vs.

BABSON BROS., INC.,

Defendant.

State of New York,

County of New York,—ss.

Camillus A. Senne being duly sworn, deposes and says:

I am over the age of twenty-one years and am interested in the Reliable Gummed Tape Company, Inc., at 88-90 Cypress Avenue, New York City.

I am the patentee of United States patent No. 811,877 of February 6, 1906 for a Phonograph Horn for which application was filed on November 1, 1904, a copy of which patent is hereto annexed.

In the early part of 1904 I began the manufacture [119] of horns for phonographs. These horns consisted of tapering strips of metal provided with abutting edges that were soldered together. In the latter part of 1904, and before the filing of my said application for patent on November 1, 1904, I began the manufacture of paper horns consisting of curved strips of paper secured together at their edges by metal strips forming longitudinal ribs on the outside of the horn, said tapering strips of paper and said ribs extending from one end of the horn to the other. These tapering horns were similar to the metal horns except that the abutting edges of the tapering strips of metal were soldered together while the abutting edges of the tapering strips of paper were secured together by means of the metal ribs. I

have in my possession one of the said paper horns, which I have submitted to Mr. Hicks, counsel for defendant in this suit; and I annex hereto a photograph of said paper horn. The particular paper horn which I have submitted to Mr. Hicks and a photograph of which I annex hereto was made about February, 1905; and I have marked thereon "C. Senne— May 31 .. 13.. Mfg. 1905," but as stated above I began the manufacture of such horns before November 1, 1904.

In May, 1905, a suit in equity was begun against me and my partner, Peter E. Petersen, by the United States Horn Company in the Circuit Court of the United States for the Southern District of New York. The suit was a patent suit for alleged infringement of United States patent No. 771,441 to Nielsen for a Horn for Phonographs or Similar Machines. The suit was not defended by me or my partner, and a perpetual injunction against infringement of the Nielsen patent was issued against us by default. [120]

At the time of the said suit I and my partner were doing business under the name of the Nova Phonograph Horn Company at No. 2 Manhattan Street, New York City. We continued in business at that place till April, 1906, when we moved to No. 22 Manhattan Street.

After the permanent injunction had been issued against me and my partner I received from the attorney for the United States Horn Company a proposed agreement which I still have in my possession and which I have submitted to Mr. Hicks,

counsel for defendant herein. I annex hereto a full and correct copy of said proposed agreement. Referring to the paragraph numbered "SIXTH" of the said proposed agreement, it will be seen that by the agreement I was to transfer to the United States Horn Company all my right, title and interest in and to an invention of an improvement in phonograph horns described in a certain caveat theretofore filed by me in the Patent Office of the United States. The said improvement in phonograph horns is described in said proposed agreement as

"comprising generally a series of distinct curved paper strips joined together at their side edges by means of metal strips and protected at their exposed ends by means of metal strips."

The said improvement in phonograph horns thus described is illustrated in the paper horn above referred to and of which a photograph is hereto annexed, as aforesaid, said horn consisting of curved tapering strips of paper, joined together at their edges by means of metal strips forming longitudinal ribs and protected at their ends by metal strips. According to said proposed agreement I was to be permitted to manufacture and sell such paper horns upon payment of royalty to said United States Horn Company under the Nielsen patent. [121]

Referring to the paragraph marked "FIFTH" of said proposed agreement my patent application there referred to is my application, Serial No. 231,003 which was filed on November 1, 1904, and resulted in my said patent No. 811,877. It was not filed on February 9, 1905, as stated in said proposed agree-

ment. The Serial No. 231,003 is correctly set forth in the said proposed agreement, though the date of application is incorrect. According to said proposed agreement I was to pay royalty under the Nielsen patent upon the collapsible horn of my said patent.

I called to see the attorney for the United States Horn Company, Mr. Burnham C. Stickney, at his request. When I received the contract which he proposed and sent to me I refused to execute it. I did write my name opposite the seal at the end of the proposed agreement but I never executed the agreement by delivering it so that the agreement was never made.

After having received said proposed contract from said attorney, Mr. Stickney, I called again to see him, but I did not state to him that I had sold my horn business; nor did I state to him that I and my partner, Petersen, had quit the business and would have nothing further to do with the manufacture or sale of phonograph horns. It was not until a year after this interview with Mr. Stickney had occurred in the latter part of 1905 that I and my partner, Petersen, sold our horn business. We sold our horn business either in the latter part of 1906 or the early part of 1907.

After I had refused to sign the said proposed agreement as sent to me by said attorney, Mr. Stickney, a woman called at our place of business at No. 2 Manhattan [122] Street, New York City, and purchased a horn made of paper. This paper horn was similar to the paper horn above described and of which a photograph is annexed hereto, as

aforesaid; but the tapering strips of paper were not separate from each other, and no metal ribs were used. Instead of the metal ribs, longitudinal ribs were pressed along the edges of the curved tapering strips of paper so as to form external longitudinal ribs. In other words, the horn was made of one piece of material, and the ribs were pressed into the paper in such manner as to form tapering strips of the paper, having longitudinal ribs upon the outside of the paper and, therefore, upon the outside of the horn. Immediately after the woman had purchased the said paper horn Christian Krabbe came into our place of business, that is, within the next few minutes, and threatened contempt proceedings on account of the sale of the said paper horn, adding that he would have me arrested. About two days after this occurrence and during the same week, at the request of Mr. Krabbe, I called upon him in Brooklyn, and he offered to buy me out for the sum of five hundred dollars (\$500.00), but I refused the offer. Previously to this visit Mr. Krabbe told me that they did not want to make money by making and selling horns but wanted to make money out of others who were making and selling horns through suits based upon the Nielsen patent and requiring the manufacturers of horns to pay a royalty under the patent. Mr. Krabbe represented the United States Horn Company.

When I and my partner moved to No. 22 Manhattan Street in April, 1906, we continued making paper horns till the middle of 1907. When I went into the business of making and selling gummed tape

I used gummed tape instead [123] of metal strips to join together the edges of the tapering strips of paper since the gummed tape was cheaper than the metal strips. I have in my possession and have submitted to defendant's counsel, Mr. Hicks, one of these horns having the edges of the tapering strips of paper joined together by gummed tape. This horn was made by me in 1907. I annex hereto a photograph of the said horn. It will be seen that the horn is of the same shape and construction as the other horns above described, except that the tapering strips which make up the horn are joined at their edges by means of gummed tape upon the inside and upon the outside of the horn, making longitudinal ribs extending from the small end to the large end of the horn.

I am familiar with metal horns like the two small horns in the possession of defendant's counsel, Mr. Hicks, about twenty-one inches long and consisting of two parts to wit, the flaring part at the large end of the horn and the part composing the rest of the horn, each of said two parts being composed of two tapering strips of metal joined together at their edges, forming lock seams on the outside of the horn, said two parts of the horn being joined together by a lock seam extending around the circumference of the horn. I can see no difference between such horns and the horns of the Nielsen patent here in suit, except for the fact that the so-called Nielsen horns have usually been painted. I regard horns made of paper and other like material as superior to horns made of metal. The longitudinal ribs used

by Nielsen are means merely for joining together the tapering strips of metal which make up the horn. The ribs have no effect upon the sound-giving qualities of the horn. They result merely from the mechanical construction of the horn, and so do the ribs formed [124] in the construction of a paper horn from tapering strips of paper joined together at their edges. Horns made of paper or wood give clearer sounds than do metal horns. In constructing a horn from metal instead of from wood or paper it was obvious in the art of making horns for phonographs that some appropriate means must be employed for joining together the edges of the tapering metal strips of which the horn was made. Hence solder or the lock seam or solder and the lock seam have generally been employed for joining together the tapering strips of a metal horn. Strips of metal or of wood or of paper or other like material, either with or without an adhesive material such as glue, according to the necessities of the case, have been employed as obvious means for joining together the tapering strips of wood, paper, celluloid or other like material employed in the making of a phonograph horn. In each case longitudinal ribs result from the mechanical construction of the horn, whether the horn be made of metal or other material.

I am familiar with the well-known Kaiser horn made of tapering strips of tough paper, secured together at their edges. I was familiar with it, in the city of New York, as early as the year 1901. It had been on the market for several years and was very popular. When I began the making and selling of

horns for phonographs and went about in the city of New York selling horns the Kaiser horn was exhibited to me, and phonograph records were played for exhibition upon talking machines having Kaiser horns.

CAMILLUS A. SENNE.

Subscribed and sworn to before me this fifth day of June, 1913.

[Notary's Seal] HERMAN BORSIG, Jr.,

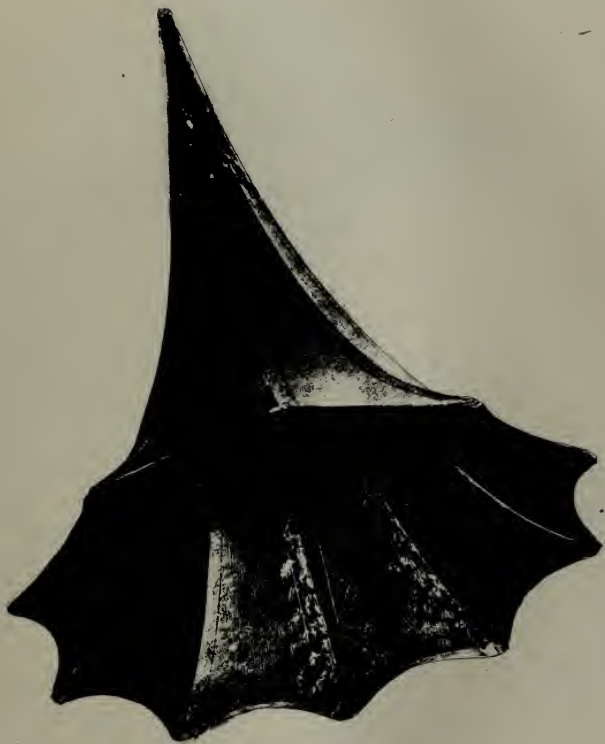
Notary Public, No. 271. New York County.

[125]



Semmes Paper Horn
with
Metal Strips





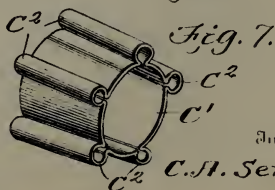
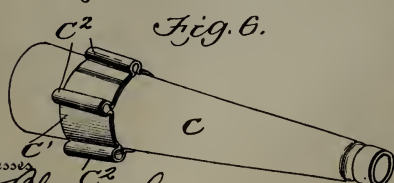
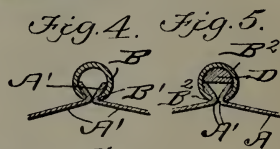
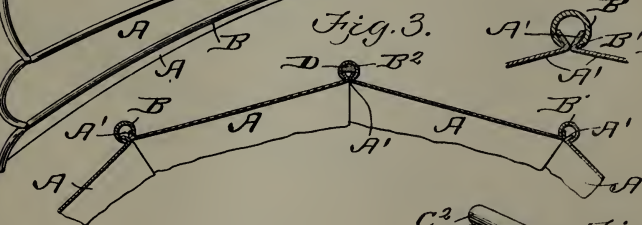
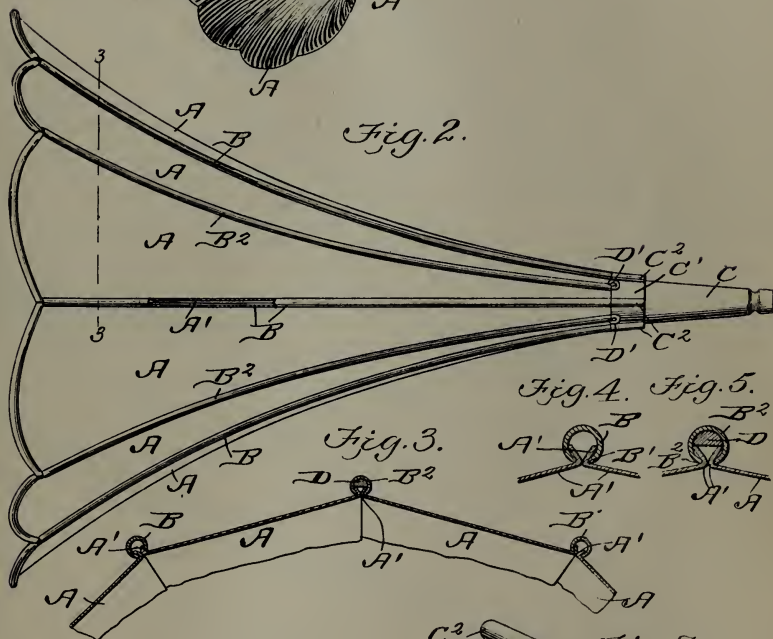
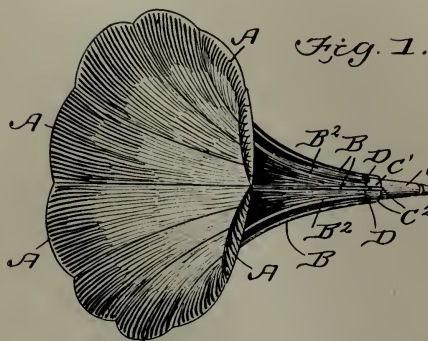
Sennes Paper Horn with
Gummed-Tape Strips

No. 811,877.

PATENTED FEB. 6, 1906.

C. A. SENNÉ.
 PHONOGRAPH HORN.
 APPLICATION FILED NOV. 1, 1904.

2 SHEETS—SHEET 1.



Inventor

C. A. Senné.

Witnesses
 M. J. Blouet,
 E. B. McEach.

By O'Meara & Brock,
 Attorneys.

No. 811,877.

PATENTED FEB. 6, 1906.

C. A. SENNÉ.
 PHONOGRAPH HORN.
 APPLICATION FILED NOV. 1, 1904.

2 SHEETS—SHEET 2.

Fig. 8.

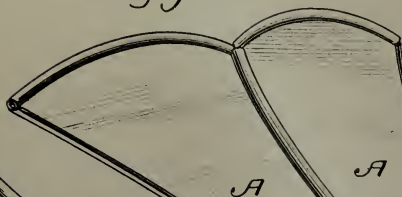


Fig. 9.

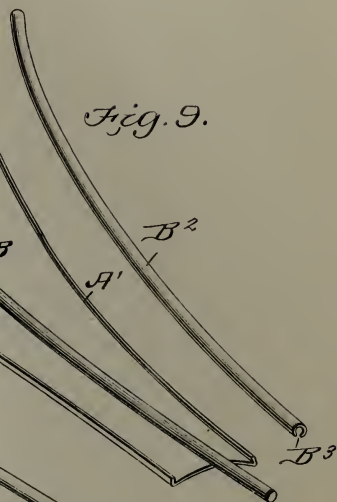


Fig. 9a.

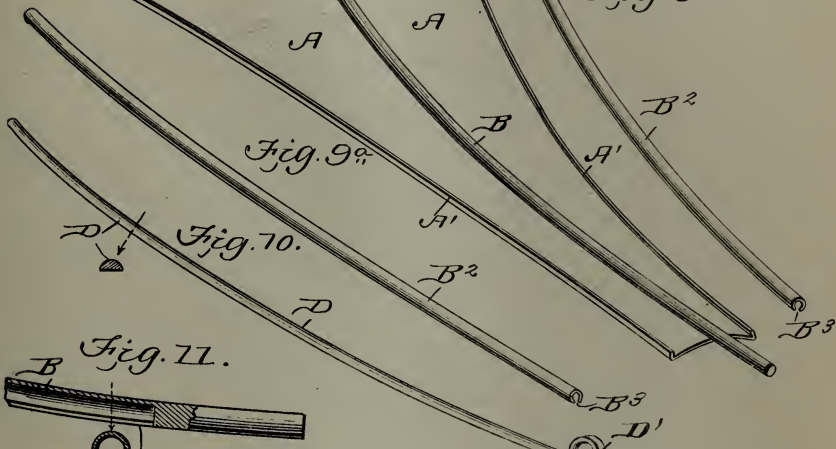


Fig. 10.

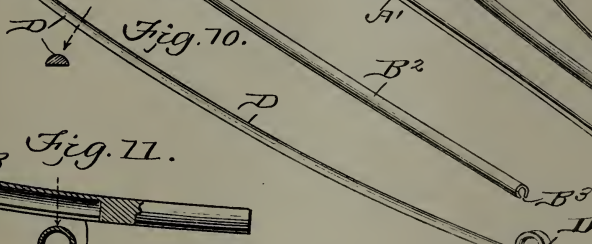


Fig. 11.

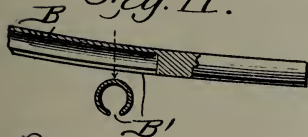


Fig. 14.

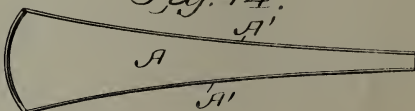


Fig. 12.

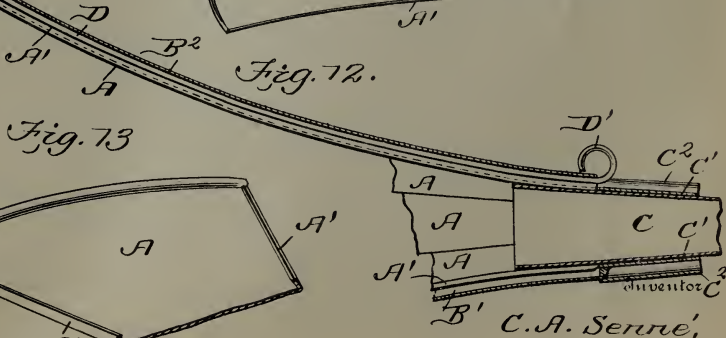
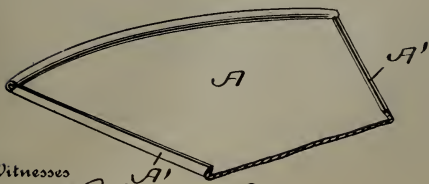


Fig. 13.



Witnesses

W. H. Clouet,
 E. B. McBeth.

C. A. Senné,
 Attorney.

PHONOGRAPH-HORN.

No. 811,877.

Specification of Letters Patent.

Patented Feb. 6, 1906.

Application filed November 1, 1904. Serial No. 231,003.

To all whom it may concern:

Be it known that I, CAMILLUS ANTONETTE SENNÉ, a citizen of the United States, residing at New York, in the county of New York and State of New York, have invented a new and useful Improved Phonograph-Horn, of which the following is a specification.

This invention relates to an improved collapsible horn especially designed for use in connection with phonographs and the like, the object being to provide a horn that may be "knocked down," so that it may be readily packed in a small space and also that its transportation may be facilitated.

With these briefly-stated objects in view, the invention consists in providing a series of blades or sections, each having their edges formed with flanges over which is secured a locking-rib, by which the sections are securely held together, and sleeves having tubular portions engaging alternate ribs, the device as a whole being in the shape of a horn.

The invention also comprises means for holding the horn to the tube-nozzle, which is also employed for locking the sections and holding the horn in a perfectly secure condition.

The invention further consists in certain details of construction and novelties and combinations of parts as will be fully described in the following specification and pointed out in the claims, reference being had to the drawings, in which—

Figure 1 is a perspective view of a horn constructed in accordance with my invention. Fig. 2 is a plan view of the same. Fig. 3 is a detail section on the line 3 3 of Fig. 2. Figs. 4 and 5 are enlarged detail sections drawn through the uniting-ribs and flanges. Fig. 6 is a detail perspective view of the tube-nozzle, showing my improvement arranged therein. Fig. 7 is a detail perspective view of my improved sleeve that fits upon the tube-nozzle. Fig. 8 is a detail perspective view of one of the sections of the horn. Figs. 9 and 9^a are detail views of the hollow uniting-ribs. Fig. 10 is a detail view of one of the strips which are arranged in the ribs. Fig. 11 is a detail section of the inner end of one form of uniting-rib. Fig. 12 is a longitudinal section drawn through one of the uniting-ribs and the tube-nozzle. Fig. 13 is a detail perspective view of the outer end of one of the blades, and Fig. 14 is a detail plan view of a complete blade.

In constructing a horn in accordance with

my invention, I employ a series of blades or strips A, which may be of any suitable material, each being wider at its outer end and tapering upon a curved line to its inner end, so that when all of the blades are assembled they will produce a horn having a flaring mouth, or, in other words, bell-shaped; but this special design is not essential, as the tapering blades may be perfectly straight upon their longitudinal edges, in which case a horn shaped like a truncated cone will be produced. The longitudinal edges of each blade are bent outwardly and inwardly to provide a flange A', over which is placed a tubular rib B, having slots B' arranged upon their lower longitudinal surface through which the flanges project, and by bending the flanges, as described, when the ribs are arranged thereon the sections will be firmly and securely locked together. In practice I propose to arrange these blades in pairs or sections, as shown in Fig. 8 of the drawings, and to permanently retain the ribs B thereon and to provide the ribs of a greater length than the blades, so that their inner ends will project slightly beyond the inner ends of the sections, the projected ends being made solid to add strength to the ribs. In order to hold these sections in position, I provide a tube-nozzle C with a sleeve or band C', which is made of a single length of material and bent at regular intervals to provide a series of tubular sections or barrels C², and in these barrels the projecting ends of the ribs B are held when the horn is complete. As the blades are arranged in sections, as before described, and the ribs B employed for holding the sections together the opposite flanged edges of each section will be free, and to unite them I employ tubular ribs B², slotted throughout their entire length, as shown at B³, and in practice the ribs B² are slipped over the flanges from their inner ends and pushed thereon until the entire surface of the flanges is covered. Of course it will be understood that these ribs B² are of a length to equal that of the longitudinal edges of the blades A, and in order to securely hold them in position and to securely lock them in position I employ strips D, semicircular in cross-section, which are inserted in the ribs so that their flat surface will engage the edges of the flanges, and their circular edges will engage the inner surface of the ribs and in order to facilitate the withdrawal of the strips D and also their insertion into the ribs I propose to

143 bend their inner ends back upon themselves, as shown at D'.

In setting up a horn constructed like my invention I first place the sleeve C' upon the hose-nozzle and then take the sections formed by the blades A and insert the projecting ends of the ribs into each of the tubular sections or barrels C². The ribs B² are then pushed over the flanges of the abutting blades, the strips D inserted into the ribs B², and the complete horn is then produced. It will be readily seen that this operation is exceedingly simple, and it is only necessary to withdraw the ribs and strips from the sections and each section disconnected from the nozzle-tube and the sections may be readily packed into a very small space.

In practice I prefer to bend the free ends of the blades at their outer ends back upon the body of the blade in a circular form and to insert a wire therein, which adds to the artistic effect of the device, besides strengthening the outer ends of the blades as well as avoiding sharp surfaces.

From the foregoing it will also be seen that I provide a collapsible horn so constructed that will take up very little space when in a knocked-down form.

I have found from actual experience that when the horn is set up the vibrations caused by the sound are not impaired and a perfectly clear tone is produced.

Having thus fully described my invention, what I claim as new, and desire to secure by Letters Patent, is—

1. A horn comprising a series of blades, each having flanges upon their longitudinal edges, ribs engaging said flanges, and a sleeve having tubular portions in which the alternate ribs are held.

2. A horn comprising a series of blades, each having flanges upon their longitudinal edges, ribs engaging said flanges, a sleeve having tubular portions in which the alternate ribs are held, and a tube-nozzle for supporting the said sleeve.

3. A horn comprising a series of blades, each having flanges upon their longitudinal edges, ribs engaging the flanges, the alternate ribs projecting beyond the inner ends of the blades, a sleeve having tubular sections in which the projecting ends of the ribs are held, a tube-nozzle for supporting the sleeve and strips engaging the remaining alternate ribs.

4. A horn comprising a series of flanged blades arranged in pairs, the blades of each pair being united by means of ribs which extend beyond the inner ends of the blades, tubular ribs for uniting the abutting edges of each pair, and means for engaging the projecting ends of the first-named ribs.

5. A horn comprising a series of blades arranged in pairs each pair having a rib projecting therefrom, a sleeve having tubular portions in which the projected ends of the

ribs are held, tubular ribs for uniting the edges of each pair of blades, strips arranged within the said tubular ribs, and a tube-nozzle for supporting the sleeve.

6. A horn comprising a series of tapering blades, each being flanged upon their longitudinal edges, tubular ribs engaging the abutting flanges of each blade for locking the said blades together, the alternate ribs projecting beyond the inner ends of blades, a sleeve having tubular sections in which the projected ends of the ribs are held, and a tube-nozzle for supporting the sleeve.

7. A horn comprising a series of blades, each being tapered from its outer to its inner end, and flanged along the said tapering edges, tubular ribs engaging the flanges for uniting the blades, the alternate ribs projecting beyond the blades and made solid, strips arranged within the opposite alternate ribs, and a sleeve connected to the projected ends of the ribs.

8. A horn of the kind described, comprising a series of tapering blades arranged in pairs, each blade being flanged upon its longitudinal tapering edges, said blades being arranged in pairs, ribs engaging the flanges to unite the blades to form the pairs, said ribs projecting beyond the inner ends of each pair, a sleeve having tubular portions in which the projected ends of the ribs are held, tubular ribs engaging the abutting flanges of each pair, and strips arranged within the last-named ribs.

9. A horn of the kind described, comprising a series of tapering blades, each having a flange upon its longitudinal edges, said blades being arranged in pairs, and held together by tubular ribs, the ends of which project beyond the inner ends of the blades, a sleeve having tubular portions in which the projected ends of the ribs are held, tubular ribs engaging the abutting flanges of each pair of blades, semi-cylindrical strips arranged within the last-mentioned ribs and engaging the flanges of the blades for the purpose specified.

10. A horn comprising a series of longitudinal tapering blades, each having its longitudinal edges bent outwardly and inwardly to form flanges which diverge when the abutting edges of the flanges are placed together, tubular ribs fitting over the flanges, the alternate ribs projecting beyond the inner ends of the blades, a sleeve having tubular sections in which the said projecting ends of the ribs are held, the remaining alternate ribs being of the same length as the blades, and strips arranged within the last-mentioned ribs, said strips having one end bent to provide a ring all substantially as and for the purpose specified.

GAMILLUS ANTONETTE SENNÉ.

Witnesses:

M. D. BLONDEL,
E. M. VENN.

**[Memorandum of Agreement Between U. S. Horn
Co. and Camillus A. Senne.]**

MEMORANDUM OF AGREEMENT made and entered into this —— day of ——, 1905, by and between the UNITED STATES HORN COMPANY, a corporation organized and existing under and by virtue of the Laws of the State of New York, and having its principal office and place of doing business in the Borough of Brooklyn, City and State of New York, party of the first part, and CAMILLUS A. SENNE, of No. 2 Manhattan Street, in said City and State of New York, party of the second part.

WHEREAS said United States Horn Company is the sole and exclusive owner of United States Letters Patent, No. 771,441, granted to Peter C. Nielsen for an improvement in horns for phonographs or similar machines;

AND WHEREAS, an infringement suit in which said Company was Complainant, and said Senne was a defendant in the Circuit Court of the United States for the Southern District of New York, has been terminated by the entry of a decree in said Court, against said Senne and others, and an injunction in due form of law has been served upon said Senne and others associated with him, prohibiting him and them from making, using or selling phonograph horns infringing said patent during the remainder of the term of the life of said patent.

NOW, THEREFORE, it is agreed as follows:

FIRST: Said Senne covenants and agrees to pay to said Company, upon each and every horn man-

ufactured or sold by him or his associates, a sum equal to five per cent of the price at which said Senne or his associates sells phonograph horns embodying the invention set forth in said patent and including horns similar to those heretofore manufactured and sold by said Senne, as shown by the horn marked "Exhibit A" and attached to this agreement provided [131] that not less than three cents are to be paid on each horn by said Senne and his associates to said Company.

SECOND: Said royalties are to be paid on the first days of January, April, July and October, in each year, upon all horns sold more than thirty days prior to said dates; and said Senne covenants to make and furnish each month to said Company, a statement showing the number of horns made and sold during the current month, and also the names and addresses of the vendees. Said Senne covenants to keep separate books of accounts showing the number of horns manufactured, and, which horns shall be consecutively numbered, and which books shall show the names and addresses of the persons, firms or corporations to whom such horns shall be sold, and said books shall be opened to the inspection of said Company, or its duly authorized agent or attorney, at all reasonable times at the manufactory or establishment of said Senne in the City of New York.

THIRD: Upon each of said horns, Senne is to stamp or permanently affix the following: "Patented October 4, 1905, No. 771,441."

FOURTH: Said Senne for himself, his associates, agents, successors and assignees, covenants not to

ignore or contest at any time hereafter said Letters Patent.

FIFTH: Said Senne hereby transfers, assigns and confirms unto said United States Horn Company, all right, title and interest in and to a certain application for United States Letters Patent, No. 231,003, filed Feb. 9, 1905, for Improvements in phonograph horns, reserving, however, to himself the right to manufacture and sell horns in accordance with said applications, but upon all such horns said Senne covenants to pay royalties, as aforesaid, to said [132] Company, and said Company covenants to prosecute said application, and obtain the issuance of patent thereon, and it further covenants not to license or grant any rights thereunder to any person or concern, other than said Senne or his nominees.

SIXTH: Said Senne hereby further transfers, assigns and confirms unto said United States Horn Company, all right, title and interest in and to an invention of an improvement in phonograph horns, embodied in horns heretofore generally manufactured and sold by said Senne, and described in a certain Caveat heretofore filed by said Senne in the Patent Office of the United States ("Exhibit A" attached hereto being a copy of the drawing accompanying said Caveat and now on file in said Patent Office), and comprising generally a series of distinct curved paper strips joined together at their side edges by means of metal strips, and protected at their exposed ends by means of metal strips, and covenants to execute all applications and instruments desired by the United States Horn Company in order to secure for

and to it a patent of the United States upon said improvement, and to assign to said Company such application and patent, reserving however to himself the right to manufacture and sell horns in accordance with said invention, application and patent, but upon all such horns said Senne covenants to pay royalties as aforesaid to said Company; and said Company covenants to prosecute said application at its own proper expense, and obtain, if possible, the issuance of patent thereon, and it further covenants not to license or grant any rights thereunder to any person or concern, other than said Senne or his nominees. [133]

SEVENTH: Said Senne further covenants for himself and associates, that he will not sell horns at any time during the life of said Nielsen patent for less than the average price at which corresponding horns are sold by other manufacturers in the same market; and said Senne further covenants, that in case two or more concerns manufacturing horns extensively, shall agree with said Company not to sell horns below certain specified prices, said Senne or his associates will not sell corresponding horns below the same prices.

EIGHTH: Said United States Horn Company hereby stipulates with said Senne that there shall be excepted from the operation of said injunction all horns manufactured or sold by said Senne or his associates in accordance herewith, this exception to continue, however, only so long as said Senne and his associates shall perform promptly and in good faith each and all of the covenants herein made by him;

but it is further stipulated by the parties hereto, that said injunction otherwise is and shall be fully binding and operative upon said Senne for himself and his associates; it being understood that in case said Senne and his associates, agents, successors and assigns carry out in good faith all the promises and covenants herein made by said Senne, then and in that event such exception shall not be withdrawn by said United States Horn Company, its successors or assigns, at any time during the life of the said Nielsen patent.

IN WITNESS WHEREOF, said Company has caused this agreement and stipulation to be signed by its ———, and its corporate seal to be hereto affixed, and said Senne has hereto set his hand and seal, the day and year first above written.

UNITED STATES HORN COMPANY,

By _____,

(Sgd.) C. SENNE. [Seal] [134]

State of New York,

City and County of New York,—ss.

On this ——— day of ———, 1905, personally appeared before me Camillus A. Senne, to me known and known to me to be the person described in and who executed the foregoing instrument, and acknowledged to me that he executed the same.

[Seal]

_____,
Notary Public. [135]

[Affidavit of Louis Hicks Dated June 7, 1913.]

District Court of the United States, Northern District of California, Second Division.

SEARCHLIGHT HORN COMPANY,
Plaintiff,

vs.

PACIFIC PHONOGRAPH COMPANY,
Defendant.

SEARCHLIGHT HORN COMPANY,
Plaintiff,

vs.

BABSON BROS., INC.,
Defendant.

State of New York,
County of New York,—ss.

Louis Hicks, being duly sworn, deposes and says:

I am of counsel for defendants in the above-entitled suits and have my office at No. 233 Broadway, New York City. I have examined the record in the suit of United States Horn Company, Complainant, against Peter E. Petersen and Camillus A. Senne, Defendants, being Equity suit No. 9072, in the office of the clerk of the Circuit Court of the United States for the Southern District of New York. The subpoena *ad respondendum* and the bill of complaint were filed on May 1, 1905. The bill alleged that complainant was a New York corporation having its principal office in Brooklyn, New York; that Peter C. Nielsen made application for United States patent No. 771,-

441, which was issued on October 4, [136] 1904; that on February 2, 1905, said Nielsen assigned said letters patent and all his right, title and interest in the invention granted to him thereby to Christian Krabbe of Brooklyn; that on February 14, 1905, said Krabbe assigned to William H. Locke, Jr., of Brooklyn, New York, an undivided one-half interest in said patent; and that on February 24, 1905, said Krabbe and said Locke assigned their interests to the United States Horn Company. The record further shows that Burnham C. Stickney appeared as solicitor for complainant; that Frederick S. Stitt appeared as solicitor for defendants on June 5, 1905, and that Warner, Johnson & Galston were substituted as solicitors for defendants on October 30, 1905. Defendants having filed no answer to the bill, a decree *pro confesso* was entered against them and in accordance with said decree *pro confesso* a perpetual injunction was issued against defendants enjoining them "from further infringing the same (Nielsen patent No. 771,441), and from manufacturing, using or selling the said infringing phonograph horns, or any phonograph horns containing or embodying the invention or inventions embraced in said letters patent."

The record further shows that the defendants, after the issue of said perpetual injunction, moved to set aside the said decree, *pro confesso*, and for leave to interpose a defense; that the motion was granted upon the condition that defendants file a bond in the sum of two hundred and fifty dollars (\$250.00) to secure complainant against costs; but

that the defendants did not avail themselves of the leave so granted and did not interpose any defense.

Among the papers on file in said suit is an affidavit of Burnham C. Stickney, solicitor for complainant, a [137] full and complete copy of which is hereto annexed, except the exhibits referred to in said affidavit. I have read the original affidavit of said Burnham C. Stickney, on file in the clerk's office, and have obtained from the clerk a certified copy thereof, with the exception of the exhibits annexed to the affidavit, which are immaterial for the purposes of this suit; and therefore know that the annexed copy of said affidavit is correct. I annex a copy of the affidavit of said Burnham C. Stickney in order to show that he mailed to Camillus A. Senne, on behalf of the United States Horn Company, the proposed agreement of which a copy is annexed to the affidavit of said Senne, filed on behalf of defendants in the above-entitled suits.

I have had in my possession, since March, 1902, a copy of a book entitled "A Complete Manual of the Edison Phonograph," by George E. Tewksbury, published at Newark, New Jersey, in 1897. I annex hereto a photograph of the illustration of Horns for Phonographs, appearing on p. 70 of said book. In the chapter headed "Horns and Tubes," appearing on pp. 71-75, inclusive, of said book, the following statements appear:

"With the Phonograph a speaking tube and listening tube are provided. The speaking tube for dictation purposes meets the conditions acceptably. The single tube for listening is the

best device for the purpose. But for concert use and public entertainment, the sound must be thrown out so that many persons can hear it, and for this purpose numerous types of amplifying horns have been produced. It would astonish the casual reader to learn of the number and thoroughness of the experiments in that direction. Mr. Edison has himself tried a vast number of sizes and shapes, out of all sorts of material. Other experimentalists and enthusiasts have gone over the same ground, and branched out into new paths. Yet all have come back to the main travelled road. Wood, iron, steel, zinc, copper, brass, tin, aluminum, cornet metal, german silver, have been tried. Glass, too, and hard rubber, papier-maché, and probably every other product that nature yields or man contrives. The latitude as to form and shape being greater than the resource in material, there have been [138] almost innumerable attempts in that line. After all of which it may be said that tin and brass, defective as they are, have been settled upon as the most available, and the forms now known in the trade as the most desirable. Any horn to be good must come out of sound metal, and be perfectly joined. Ordinary joining will not do, and imperfect metal is a delusion. * * * ”

“The 26-inch standard tin horn is deservedly the amplifying device most used, and all things considered, gives as good results as any. It is not expensive, can be used for recording and reproducing both, and fulfills all reasonable re-

quirements of horn service. When correctly made, block tin is used, and the joints are so fastened as to prevent rattle. If made of cheap material, it is the same abomination that all other cheap supplies for the Phonograph are. The horn is heavily japanned, not for looks merely. It is held in place on a folding tripod, to the loop of which it should be attached by string, ribbon, or other non-conducting material, never by a metal hook or wire. The connection with the speaker of the Phonograph is effected by a short length of rubber tubing. In the use of this, as with all other large horns, the best results are obtained many feet away from the mouth of the horn, which is so built as to project the volume of tone forward. The measurement at the bell or opening of this horn is 12 inches, and the lines from the bell to the nipple are straight. Similar in results, but different in character, is the 22-inch brass horn, preferred by some because it is thought to give a more ringing effect to the reproduction of band and orchestra music, and claimed by others to make all reproduction brighter. This horn has a flaring bell, and is 12 inches in width at its mouth. It is suspended the same as the 26-inch horn to the loop of a folding stand, and makes a striking appearance.

* * *

“The interesting picture facing this chapter shows a group of recording horns used in a record laboratory. It was drawn from a photograph.”

I submit herewith copies of the following French patents, together with translations thereof in the English language, to wit:

No. 301,583, of June 23, 1900, to Guerrero;

No. 318,742, of February 17, 1902, to Turpin;

No. 321,507, of May 28, 1902, to Runge;

No. 331,566, of April 28, 1903, to Hollingsworth.

[139]

I have made the translations of the foregoing French patents and the translations are correct.

I have obtained from the Commissioner of Patents a certified copy of the file wrapper and contents of the Nielsen patent in suit, No. 771,441, and I annex hereto a full, true and complete copy thereof.

I have obtained a certified copy of Belgian patent No. 163,518 of May 28, 1902, to W. C. Runge. The description, claims and drawings of said Belgian patent are precisely the same as the description, claims and drawings of French patent No. 321,507 of May 28, 1902, to W. C. Runge. Therefore I deem it unnecessary to submit a copy of the said Belgian patent upon this motion although it has been referred to in the affidavits filed on behalf of defendants, since the French patent makes the same showing as the Belgian patent.

I annex hereto an illustration of Scott's phonograph of 1857. This illustration appeared in the *Electrical World* for November 12, 1887, on page 256, published in New York, N. Y. It also appeared as part of a paper read before the Franklin Institute on May 16, 1888, by Emile Berliner (See Vol. 125, p. 425 of the *Journal of the Franklin Institute*,

printed and published in 1888 in Philadelphia, Pa., by the Franklin Institute). This illustration shows the phonautograph patented by Scott in France in 1857, as I know from a certified copy of Scott's French patent of 1857. Reference to the illustration shows that the first horn employed for the recording of sound waves consisted of tapering strips (eight in number) extending [140] from one end of the horn to the other. The horn is larger at one end than at the other and tapers in the usual manner. The tapering strips are secured together at their edges thus forming longitudinal seams and ribs extending from one end of the horn to the other. I have been familiar with the patents and literature of the United States and foreign countries, relating to phonographs for more than fifteen years, and I have spent many years in litigation over patents relating to phonographs and like machines. Claim 3 of the Nielsen patent in suit is anticipated by the horn of Scott's phonautograph of 1857 since, obviously, the tapering strips of which the horn of Scott's phonautograph consists are secured together at their edges and form longitudinal seams and ribs on the outer side thereof. This is clearly indicated by the angles formed upon the outside of the horn of Scott's phonautograph where the edges of the tapering strips are joined together. The only difference between claims 1 and 2 of the Nielsen patent and the horn of Scott's phonautograph is one of degree, in that Nielsen's outwardly directed flanges extend a little further out than do the angles formed by the joining together of the tapering strips of Scott's horn. Reference to the

United States patent No. 362,107 of May 3, 1887, to Penfield shows, in fig. 2, a metallic barrel made up of tapering strips of metal, provided with inwardly directed flanges whereby said strips are connected, precisely like Nielsen's horn, except that the flanges extend inwardly instead of outwardly. The circumference of Penfield's metallic barrel is circular and does not show the ribs of the horn of Scott's phonograph upon the outer side thereof. I refer to Penfield's metallic barrel, merely to show that as early as 1857 the construction of horns for phonographs followed the methods of constructing such instruments by workers in the tinsmith's or sheet metal art, Fig. 2 of United [141] States patent No. 491,421, of February 7, 1893, to Gersdorff, shows a horn or funnel consisting of a plurality of tapering strips joined together at their edges by lock seams forming longitudinal ribs upon the outside of the horn or funnel. The horns for phonographs, similarly made, are nothing but the horns or funnels of the Gersdorff patent, it being apparent that, whether the horn or funnel be used in one way or another, the horn or funnel remains the same instrument. A horn for a phonograph is nothing but a funnel, and it is immaterial whether it be used to convey sound or to convey a liquid. It is capable of either use without any change or adaptation whatsoever.

LOUIS HICKS.

Subscribed and sworn to before me this 7th day of June, 1913.

[Notary's Seal] FRANCIS J. McLOUGHLIN,
Notary Public, Kings County.

Certificate filed in New York County. #10.
[142]

[Affidavit of Burnham C. Stickney.]

*United States Circuit Court for the Southern Dis-
trict of New York.*

UNITED STATES HORN COMPANY,

Plaintiff,

against

PETER E. PETERSEN and CAMILLUS A.
SENNE,

Defendants.

State of New York,
County of New York,—ss.

Burnham C. Stickney, being duly sworn, deposes and says:

That Peter E. Petersen and Camillus A. Senne, at the time of the filing of the bill of complaint, in this action, and long prior thereto, were partners doing business in the Southern District of New York, under the name and style of Nova Phonograph Horn Co., as appears in the bill of complaint in this case, and as also appears by a certified copy of the public records of the State of New York hereto annexed and marked Exhibit "A." Annexed hereto and marked Exhibit "B" is a postoffice registry return receipt addressed to me and signed "Nova Phono Horn Co., C. Senne," which was received by me in the early part of May, 1905.

On or about June 6th, 1905, I received a letter from

Frederick S. Stitt, and signed by him, notifying me that he had entered his appearance as solicitor for defendants Petersen and Senne in this action, and requesting me to serve all papers on him at his office, and further requesting me to send him a copy of the bill of complaint. Said letter is annexed hereto and marked Exhibit "C." I immediately [143] furnished said Stitt with a copy of the bill of complaint.

Thereafter I suggested to Mr. Stitt, that his clients agree with my clients with regard to a royalty under the Nielsen Patent in suit.

On or about the 14th day of June, 1905, I received through the mail from said Stitt, an envelope which is annexed hereto and marked Exhibit "D" which contained a letter which is also annexed hereto and marked Exhibit "E." Said letter is signed by Mr. Stitt, and it notified me, that he had on that day, June 14th, been in consultation with Mr. Senne, and that Mr. Senne desired him to inform me, that Petersen and Senne were not willing to accept my proposition to pay royalties, and that Petersen and Senne proposed to defend the suit. Said letter concludes as follows:

"At the same time I wish to inform you that I have severed my connection with this case and in the future any papers should be served on the defendants personally until you are otherwise advised.

Very truly yours,

FREDERICK S. STITT."

I heard nothing further directly or indirectly from Mr. Stitt or from the defendants, until after the in-

junction herein had been served upon said defendants. Immediately after the service of said injunction, said Senne called at my office, No. 132 Nassau St., and stated to me, that he did not defend the suit, because he had concluded that it would be unwise and inexpedient for him to do so, and he also remarked to me; that it would have cost him and Petersen more to defend the suit, than they would make out of the horn business in an entire year. He then offered me on behalf of himself and Petersen to pay a royalty to the complainant herein of three cents upon each horn manufactured [144] by the defendants. I told him that I would consult with my clients in regard to his offer. My clients were willing to accept such royalty. A day or two after said first interview with Senne, he again called at my office, and talked with me as to the terms of a contract of royalty, and on the same day I prepared such contract, and mailed it to Senne.

A few days after said second interview, said Senne again called at my office, and stated that he had sold, for a large sum of money, his horn business including his unfinished and finished horns, his tools and goodwill to a certain concern, whose name he refused to give me. He further stated at this third interview, that the concern to whom he had made the sale had placed the whole matter in the hands of its attorneys. Senne further stated at said interview that he had been to see the attorneys of said concern, and that they had told him that they would have the decree and injunction in this suit set aside.

Said Senne also stated to me in said third inter-

view that he and his partner Petersen had quit the business, and would have nothing further to do with the manufacture or sale of phonograph horns.

I have no information of the name of the concern, or persons, to whom the defendants have sold their business.

BURNHAM C. STICKNEY.

Subscribed and sworn to before me this 9th day of November, 1905.

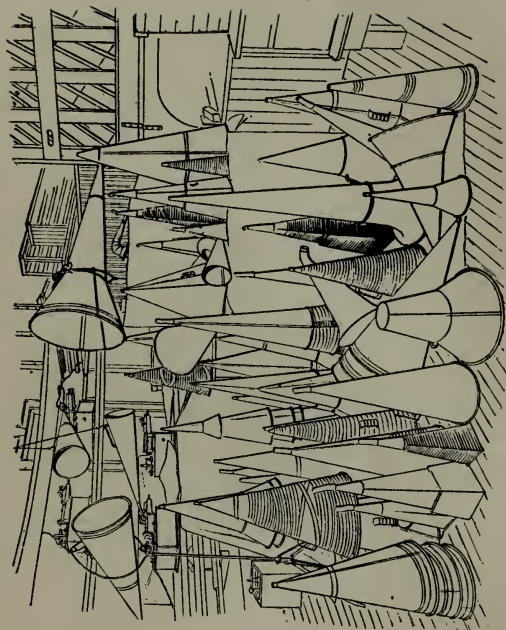
JOHN M. RUCK,
Notary Public, N. Y. Co.

[Endorsed]: U. S. Circuit Court, Southern District of New York. Filed Nov. 10, 1905. John A. Shields, Clerk.

A true copy.

ALEX. GILCHRIST, Jr.,
Clerk.

[Seal: District Court of the United States, Southern District of N. Y.] [145]



2-390.

UNITED STATES OF AMERICA,
DEPARTMENT OF THE INTERIOR,

United States Patent Office.

To all to whom these presents shall come, Greeting:

THIS IS TO CERTIFY that the annexed is a true copy from the Records of this Office of the File Wrapper, Contents and Drawing in the matter of the

Letters Patent of

Peter C. Nielsen,

Number 771,441,

Granted October 4, 1904.

for

Improvement in Horns for Phonographs or Similar
Machines.

IN TESTIMONY WHEREOF I have hereunto set
my hand and caused the seal of the Patent

Seal—Patent Office United States of America. Office to be affixed at the City of Wash-
ington, this 25th day of March, in the year

of our Lord one thousand nine hundred and
thirteen and of the Independence of the
United States of America the one hundred and
thirty seventh.

F. H. TENNANT,

Acting Commissioner of Patents.

6-1625. [147]

2-437.

NUMBER (SERIES OF 1900).

203,080.

1904.

DIV 23

(EX'R'S BOOK). 114

9

(04)

PATENT No. 771,441

,190 Name—Peter C. Nielsen

of Greenpoint

County of

State of New York

filed Invention—Horn for Phonographs and Similar
Machines

Original.

Renewed.

Division of App., No.
PARTS OF APPLICATION FILED.

Petition	Apr. 14, 1904	, 190
Affidavit	“ “, 1904	, 190
Specification	“ “, 1904	, 190
Drawing	“ “, 1904	, 190
Model or Specimen Not reqd	, 190	, 190
First Fee Cash		
\$15.00	Apr. 14, 1904	, 190
“ “ Cert.	190	, 190
Appl. filed complete	Apr. 14, 1904	, 190

Examined J. T. Newton Ex.

Sept. 2, 1904 , 190

Countersigned R. E. Grant

For Commissioner.

For Commissioner.

Notice of Allowance,

Sept. 3, 1904 , 190

Final Fee, Cash \$20,

Sept. 12, 1904 , 190

“ “ Cert. , 190 , 190

Patented October 4 , 1904

Associate Attorney—Wm. N. Cromwell

1003 F. St. N. W.,

City

Attorney—Edgar Tate & Co.

245 Broadway

New York City

Name Serial Number

Patent No. Date of Patent [148]

No. 203080 No 1/2

\$15 RECEIVED filed

APR 14 1904 Ck Apl 14/04

CHIEF CLERK U. S. PATENT OFFICE

NEW YORK,

April 13, 1904.

Hon. Commissioner of Patents,

Washington, D. C.

Sir:—

We beg to enclose herewith application of Peter
C. Nielsen for Letters Patent for Horns for Phono-

graphs and Similar Machines, together with check for \$15, the Government filing fee thereon.

Very respectfully,

EDGAR TATE & CO. [149]

MAIL ROOM

APR 14 1904

No 203080 No 1½

U. S. PATENT OFFICE.

Appl'n filed

Apl 14/04

PETITION.

To the Commissioner of Patents:

Your petitioner, PETER C. NIELSEN, a citizen of the United States and residing at Greenpoint in the County of Kings and State of New York and having a post-office address at 23 Drake Ave., Greenpoint, Brooklyn, N. Y. prays that Letters Patent may be granted to him for the improvements in HORNS FOR PHONOGRAPHS AND SIMILAR MACHINES set forth in the annexed specification; and he hereby appoints Edgar Tate and William W. Canfield of the firm of EDGAR TATE & CO., 245 Broadway, New York, or their accredited agent to act as his attorneys to prosecute this application, with power to make alterations and amendments therein, to sign the drawings, to receive the patent, and to transact all business in the Patent Office connected therewith.

PETER C. NIELSEN.

SPECIFICATION.

To all whom it may Concern:

Be it known that I, PETER C. NIELSEN a citizen of the United States and residing at Greenpoint

in the County of Kings and State of New York have invented certain new and useful improvements in **HORNS FOR PHONOGRAPHS AND SIMILAR MACHINES** of which the following is a specification, such as will enable those skilled in the art to which it appertains to make and use the same. [150]

This invention relates to the horn of a phonograph or other machine of this class and the object thereof is to provide a horn for machines of this class which will do away with the mechanical, vibratory, and metallic sound usually produced in the operation such machines, and also produce a full, even and continuous volume of sound in which the articulation is clear, full and distinct.

The invention is fully disclosed in the following specification, of which the accompanying drawing forms a part, in which the separate parts of my improvement are designated by suitable reference characters in each of the views, and in which;—

Fig. 1 is a side view of my improved phonograph horn;

Fig. 2 an end view thereof;

Fig. 3 an enlarged section on the line 3—3 of Fig. 1; and

Fig. 4 a longitudinal section on the line 4—4 of Fig. 3.

In the practice of my invention, I provide a horn *a* provided at its smaller end with the usual nozzle piece *a2* by means of which connection is made with the machine, and in the form of construction shown a supplemental piece *a3* is employed between the larger or body portion of the horn and the nozzle piece *a2*,

but the parts *a3* and *a2* may be formed integrally if desired, and may be constructed in any desired manner.

The main part *a* of the horn is bell-shaped in form and tapers outwardly gradually from the part *a3* to the larger or mouth end *a4* and this curve or taper is greater or more abrupt adjacent to said larger or mouth end.

The body portion of the horn is also composed of a plurality of longitudinal strips *b* which are gradually tapered from one end to the other and which are connected longitudinally so [151] as to form longitudinal ribs *b2*, each of the strips *b* being provided at its opposite edges with a flange *b3*, and these flanges, of the separate strips *b*, are connected to form the ribs *b2*.

The body portion of the horn, or the strips *b* are composed of sheet metal, and it will be observed that the inner wall of the body portion of said horn in cross section is made up of a plurality of short lines forming, substantially, a circle, and it is the construction of the body portion of the horn as hereinbefore described, that gives thereto the qualities which it is the objects of this invention to produce, which objects are the result of the formation of the horn, or the body portion thereof of longitudinal strips *b*, and providing the outer surface thereof with the longitudinal ribs *b2*, and curving the body portion of the horn in the manner described.

If desired, the part *a3* may be formed integrally with the body portion of the horn in which event the ribs *b2* would extend to the nozzle or connecting por-

tion *a2*, and it is the longitudinal ribs *b2*, which contribute mostly to the successful operation of the horn, said rib serving to do away with the vibratory character of horns of this class as usually made and doing away with the metallic sound produced in the operation thereof.

My improved horn may be used in connection with phonographs, or other machines of this class, and changes in and modifications of the construction described may be made without departing from the spirit of my invention or sacrificing its advantages.

Having fully described my invention, what I claim as new and desire to secure by Letters Patent, is:—
[152]

1. A horn for phonographs and similar machines, the body portion of which is composed of longitudinally arranged strips of metal provided at their edges with longitudinal outwardly directed flanges whereby said strips are connected and whereby, the body portion of the horn is provided on the outside thereof with longitudinally arranged ribs, substantially as shown and described.

2. A horn for phonographs and similar machines, the body portion of which is composed of longitudinally arranged strips of metal provided at their edges with longitudinal outwardly directed flanges whereby said strips are connected and whereby, the body portion of the horn is provided on the outside thereof with longitudinally arranged ribs, said strips being tapered from one end of said horn to the other, substantially as shown and described.

8/26/04

3. A horn for phonographs and similar machines, said horn being tapered in the usual manner and the body thereof on the outer side thereof being provided with longitudinally arranged ribs, substantially as shown and described.

Insert A

[153]

IN TESTIMONY that I claim the foregoing as my invention I have signed my name in presence of the subscribing witnesses this 13th day of April, 1904.

PETER C. NIELSEN.

Witnesses:

F. A. STEWART.

C. J. KLEIN.

OATH.

STATE OF NEW YORK,
COUNTY OF NEW YORK,—ss.

PETER C. NIELSEN, the above-named petitioner, being duly sworn, deposes and says that he is a citizen of the United States and resident of Greenpoint in the County of Kings and State of New York; that he verily believes himself to be the original, first and sole inventor of the improvements in HORNS FOR PHONOGRAPHS AND SIMILAR MACHINES described and claimed in the annexed specification; that he does not know and does not believe that the same was ever known or used prior to his invention thereof, or patented or described in any printed publication in the United States of America or any country foreign thereto before his invention thereof, or more than two years prior to this application, or in public use or on sale

in the United States for more than two years prior to this application; and that no application for a patent has been filed by him or his legal representatives or assigns in any country foreign to the United States.

PETER C. NIELSEN.

Sworn to and subscribed before me this 13th day of April, 1904.

[Seal]

W. W. CANFIELD,
Notary Public. [154]

Div. 23 379 J. H. D. 2-260

Paper No. ——— Rejection

Address only

“The Commissioner of Patents,
Washington, D. C.”

All communications respecting this application should give the serial number, date of filing, and title of invention.

DEPARTMENT OF THE INTERIOR.
UNITED STATES PATENT OFFICE.

Washington, D. C., May 13, 1904.

MAILED ” ” ”

Peter C. Nielsen,
Care Edgar Tate & Co.,
#245 Broadway,
New York, N. Y.

Please find below a communication from the EXAMINER in charge of your application for Horn for Phonographs & Similar Machines, filed April 14, 1904, serial number 203,080.

F. I. ALLEN.

E. B. MOORE,

c6-2631

Commissioner of Patents.

Claim 3 of this application is rejected in view of Tourtels Eng. Pat. #20,557 of 1902, Graphophones, and U. S. Patent of Fallows, Aug. 15, 1876, #181,-159, Games and Toys, Toys, Sounding, it being held that it would not constitute patentable invention to provide a horn with longitudinal ribs, in view of the transverse ribs of Fallow's and the longitudinal rib of Tourtel.

J. T. NEWTON, Ex.

J.H.L. [155]

MAIL ROOM

No. 2

JUN 7 1904

Amdt. A

U. S. PATENT OFFICE.

C—6/7/04.M

IN THE UNITED STATES PATENT OFFICE.

Room #379.

In re Application of PETER C. NIELSEN,

Horn for Phonographs and Similar Machines,

Filed April 14, 1904. Ser. #203,080.

To the Commissioner of Patents,

Sir:—

We desire to amend the above entitled case as follows:

Add the following claim:

~~4/26/04 4. A horn for phonographs and similar machines, said horn
A being tapered in the usual manner and the body thereof on the
outer side thereof being provided with longitudinally arranged
ribs between which the longitudinal parts of the horn taper
from one end to the other, substantially as shown and described.~~

Insert B

REMARKS.

This amendment is made in view of the Official communication of May 13. The references cited in

this case do not show a horn for talking machines having longitudinally arranged ribs on the outer side thereof. One of the references cited shows spirally arranged ribs, but this in no sense anticipates applicant's invention. This arrangement of the ribs would make the horn vibrate more and cause more of a metallic sound than if no ribs at all were formed on it. It is the longitudinally arranged ribs on the outer side of the horn which produce the result claimed by applicant, and favorable action is respectfully requested.

Respectfully submitted,

EDGAR TATE & CO.,

Attorneys for Applicant.

Dated New York, June 6, 1904. [156]

Div. 23 379 2-260 Paper No. ——— Rej.
J. H. D.

Address only

“The Commissioner of Patents,
Washington, D. C.”

All communications respecting this application should give the serial number, date of filing, and title of invention.

DEPARTMENT OF THE INTERIOR.
UNITED STATES PATENT OFFICE.

WASHINGTON, D. C., June 22, 1904.

MAILED " " "

Peter C. Nielsen,
Care Edgar Tate & Co.,
#245 Broadway,
New York, N. Y.

Please find below a communication from the EX-AMINER in charge of your application for Horn for Phonographs and Similar Machines, filed April 14, 1904, serial number 203,080.

F. I. ALLEN.

E. B. MOORE,

c6-2631

Commissioner of Patents.

This action is in response to the amendment filed the 7th instant.

Claims 3 and 4 are rejected in view of the patent of Clayton, Oct. 18, 1898, #612,639, (181-25), the part "A" in said patent being considered the equivalent of applicant's horn as defined in claims 3 and 4 though said part "A" be more flaring than applicant's horn.

J. T. NEWTON, Ex.

J. H. L. [157]

MAIL ROOM

No. 4.

JUN 22 1904

Amdt. B

U. S. PATENT OFFICE.

6/22/04

IN THE UNITED STATES PATENT OFFICE.

Room 379.

In the Matter of the Application of PETER C.
NIELSEN,

Horn for Phonographs and Similar Machines,

Filed April 14, 1904. Ser. No. 203,080.

Hon. Commissioner of Patents,

Washington, D. C.

Sir:—

We desire to amend the above entitled case as follows:

Add the following claim:—

~~3. A horn for phonographic and similar instruments, said~~

~~horn being larger at one end than at the other and being composed~~

~~of longitudinal tapered strips which are secured together at their~~

~~edges, substantially as shown and described.~~

Insert C

REMARKS.

This amendment is supplemental to that dated June 6th 1904 and it is respectfully requested that said amendment be entered and the case considered in view thereof.

Respectfully submitted,

EDGAR TATE & CO.,

Attorneys for Applicant.

Dated New York, June 21, 1904. [158]

MAIL ROOM

No. 5

JUN 28 1904

O. Amdt. C.K.

U. S. PATENT OFFICE.

6/29/04

IN THE UNITED STATES PATENT OFFICE.

Room #379.

In re Application of PETER C. NIELSEN,

Horn for Phonographs and Similar Instruments.

Filed April 14, 1904. Ser. No. 203,080.

To the Commissioner of Patents,

Sir:—

We desire to amend the above entitled case as follows:—

Add the following claim:

36—A horn for phonographs and similar instruments, said horn being larger at one end than at the other and tapered in the usual manner, said C horn being composed of longitudinally arranged strips secured together at their edges and the outer side thereof at the points where said strips are secured together being provided with longitudinal ribs, substantially as shown and described.

REMARKS.

This amendment is made in view of the Official communication of June 22nd. We have carefully considered Clayton the new reference cited and we do not see any similarity therein to applicant's device either in construction or operation. The object of applicant's construction is to destroy the vibratory character of a phonographic horn, and this cannot be done by corrugating the horn as all

forms of corrugations increase the vibration instead of diminishing it. This fact ought to be apparent on its face and there is nothing in the references that meet claims 3 and 4 and favorable action thereon as well as on claims 6 presented herewith is requested.

Respectfully submitted,
EDGAR TATE & CO.,
Attorneys for Applicant.

Dated New York, June 28, 1904. [159]

Div. 23 379 2-260 Paper ——— Rej.

Address only

“The Commissioner of Patents,
Washington, D. C.”

All communications respecting this application should give the serial number, date of filing, and title of invention.

DEPARTMENT OF THE INTERIOR.

UNITED STATES PATENT OFFICE.

WASHINGTON, D. C., July 21, 1904.

MAILED ” ” ”

Peter C. Nielsen,
Care Edgar Tate & Co.,
#245 Broadway,
New York, N. Y.

Please find below a communication from the EXAMINER in charge of your application for Horn for Phonographs and Similar Machines, filed April 14, 1904, serial number 203,080.

F. I. ALLEN.

E. B. MOORE,

c6-2631

Commissioner of Patents.

This action is in response to the amendments filed the 22nd and 29th instants.

It is believed that it cannot constitute patentable invention to provide any horn with longitudinal stiffening ribs to render the horn perhaps less vibratory. Claims 3, 4 and 5 are held to be devoid of patentable novelty and invention in view of this holding and the prior art exhibited by the patents cited and the patent of Osten et al., July 22, 1902, #705,126, (181-27).

J. T. NEWTON, Ex.

J.H.L. [160]

MAIL ROOM

No. 7

JUL 27 1904

Argument

U. S. PATENT OFFICE.

7/27/04

IN THE UNITED STATES PATENT OFFICE.

ROOM 379.

In the Matter of the Application of PETER C.
NIELSEN,

Horn for Phonographs and Similar Machines,

Filed April 14, 1904. Ser. No. 203,080.

Hon. Commissioner of Patents,

Washington, D. C.

Sir:—

The Official communication of July 21st has been received and considered. This communication states that "it is believed that it cannot constitute patentable invention to provide any horn with longitudinal stiffening ribs to render the horn perhaps less vibratory," and Claims 3, 4 and 5 are rejected. We do not understand what bearing if any this statement

has on Claim 5 and an explanation is requested before further amendment of the case.

Respectfully submitted,

EDGAR TATE & CO.,

Attorneys for Applicant.

Dated New York, July 26, 1904. [161]

Div. 23 379 2-260 Paper No. ——— Rejection
M. E. P.

Address only

“The Commissioner of Patents,
Washington, D. C.”

All communications respecting this application should give the serial number, date of filing, and title of invention.

DEPARTMENT OF THE INTERIOR.

UNITED STATES PATENT OFFICE.

WASHINGTON, D. C., August 5, 1904.

Mailed Aug 5/ 04

Peter C. Nielsen,
c/o Edgar Tate & Co.,
New York City.

Please find below a communication from the EX-AMINER in charge of your application Serial No. 203,080, filed April 14, 1904, for Horn for Phonographs and Similar Machines.

F. I. ALLEN.

E. B. MOORE,

c6-2631

Commissioner of Patents.

This action is responsive to letter filed the 27th ultimo.

Claims 3 and 4 are rejected in view of the holding that it cannot constitute patentable invention to

provide any horn with longitudinal stiffening ribs to render the horn perhaps less vibratory. These claims and claim 5 are rejected also in view of the patents cited and the patent of Osten *et al* referred to in the last action.

J. T. NEWTON, Ex.

J. H. L. [162]

U. S. PATENT OFFICE

RECEIVED

No. 9.

AUG 17 1904

Asso-Power

DIVISION 25

IN THE UNITED STATES PATENT OFFICE.

ROOM 379.

In the Matter of the Application of PETER C.
NIELSEN,

Horn for Phonographs and Similar Machines,

Filed April 14, 1904. Ser. No. 203,080.

Hon. Commissioner of Patents,

Washington, D. C.

Sir:—

We hereby appoint William N. Cromwell 1003 F Street, N. W. Washington, D. C. our associate attorney in the above entitled case.

Respectfully submitted,

EDGAR TATE & CO.,

Attorneys for Applicant.

Dated New York, Aug. 16, 1904. [163]

U. S. PATENT OFFICE. No. 10

RECEIVED. Amdt.

AUG. 26, 1904.

DIVISION 23.

IN THE UNITED STATES PATENT OFFICE.

Before the Examiner,—Room 379.

In re Application of PETER C. NIELSEN,

Horn for Phonographs and Similar Machines,

Filed April 14, 1904, Serial No. 203,080.

HON. COMMISSIONER OF PATENTS,

Sir:

The above-entitled application is hereby amended as follows:

Cancel claims 3, 4 and 5.

REMARKS.

The above amendment places this case in condition for allowance, and such action is respectfully requested at an early date.

Very respectfully,

W. N. CROMWELL,

Associate Attorney. [164]

2—181.

Issue Division.

Serial No. 203,08

All communications should be addressed to "The
Commissioner of Patents, Washington, D. C."

DEPARTMENT OF THE INTERIOR,

U. S. Patent Office,

Washington, D. C., Sept. 3, 1904, 190.

Peter C. Nielsen,

% W. N. Cromwell,

City.

SIR:—Your Application for a patent for an
IMPROVEMENT IN Horn for Phonographs and
Similar Machines.

.....
.....
Filed April 14, 1904, 1, has been examined and
ALLOWED.

The final fee, Twenty Dollars, must be paid, and
the Letters Patent bear date as of a day not later
than SIX MONTHS from the time of this present
notice of allowance.

If the final fee is not paid within that period the
patent will be withheld, and your only relief will be
by a renewal of the application, with additional fees,
under the provisions of Section 4897, Revised Stat-
utes. The Office aims to deliver patents upon the
day of their date, and on which their term begins to
run; but to do this properly applicants will be ex-
pected to pay their final fees at least TWENTY
DAYS prior to the conclusion of the six months
allowed them by law. The printing, photolitho-

IN REMITTING THE FINAL FEE GIVE THE SERIAL NUMBER AT THE HEAD OF THIS NOTICE.

If payment is made by check or draft, the credit allowed is subject to the collection of the same.

graphing, and engrossing of the several patent parts, preparatory to final signing and sealing, will consume the intervening time, and such work will not be done until after payment of the necessary fees.

When you send the final fee you will also send **DISTINCTLY AND PLAINLY WRITTEN**, the name of the **INVENTOR**, and **TITLE OF INVENTION AS ABOVE GIVEN**, **DATE OF ALLOWANCE** (which is the date of this circular), **DATE OF FILING**, and, if assigned, the **NAMES OF THE ASSIGNEES**.

If you desire to have the patent issue to **ASSIGNEES**, an assignment containing a **REQUEST** to that effect, together with the **FEE** for recording the same, must be filed in this Office on or before the date of payment of final fee.

After issue of the patent uncertified copies of the drawings and specifications may be purchased at the price of 5 cents each. The money should accompany the order. Postage stamps will not be received.

Respectfully,

F. I. ALLEN,

Commissioner of Patents.

After allowance, and prior to payment of the final fee applicants should carefully scrutinize the description to see that their statements and language are correct, as mistakes not incurred through the fault of the office, and not affording [165] legal grounds for reissues, will not be corrected after the delivery of the letters patent to the patentee or his agent.
[166]

184 *Pacific Phonograph Company vs.*

\$20 RECEIVED.

Ck Sep 12 1904 Z

CHIEF CLERK U. S. PATENT OFFICE.

NEW YORK,

Sept. 10, 1904.

Hon. Commissioner of Patents,
Washington, D. C.

Sir:—

We beg to enclose herewith our check for \$20 final Government fee in the matter of the application of Peter C. Nielsen, Phonograph Horn, filed April 14, 1904, Ser. No. 203080, Allowed Sept. 3, 1904, and beg to request that the patent be duly issued.

Very respectfully,

EDGAR TATE & CO. [167]

2-191. Serial No. 203,080.

Address only

“The Commissioner of Patents,
Washington, D. C.”

DEPARTMENT OF THE INTERIOR.

C.E.R. UNITED STATES PATENT OFFICE.

Washington, D. C. Sept. 12, 1904.

Peter C. Nielsen,

C/o Edgar Tate & Co.,

245 Broadway,

New York, N. Y.

Sir:

You are informed that the final fee of TWENTY DOLLARS has been received in your application for Improvement in

Horn for Phonographs and Similar Machines.

Very respectfully

F. I. ALLEN.

E. B. MOORE,

Commissioner of Patents.

6-1784 [168]

2-421.

1904

CONTENTS:

Print

$\frac{1}{2}$ Application 1 papers.

1. Rej May 13/04.
2. Amdt. A. June 7/04.
3. Rej June 22/04.
4. Amdt. B. June 22/04.
5. Amdt. C. June 29/04.
6. Rej July 21/04.
7. Argument July 27/04.
8. Rej Aug. 5/04.
9. Asso-Power Aug. 17/04.
10. Amdt. Aug. 26/04.
- 11.
- 12.
- 13.
- 14.
- 15.
- 16.
- 17.
- 18.
- 19.
- 20.

186 *Pacific Phonograph Company vs.*

21.

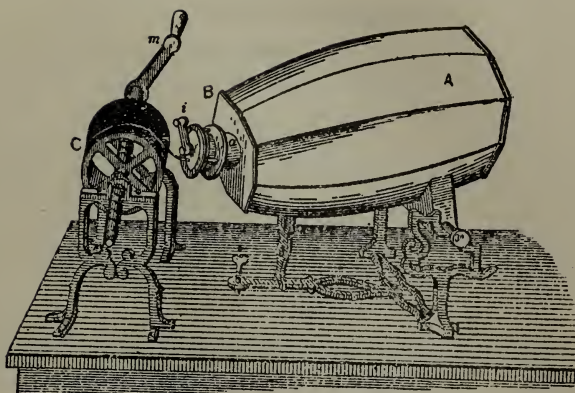
22.

23.

TITLE:

Improvement in Horn for Phonographs or Similar
Machines. [169]

FIG. 1.



Scott's Phonautograph.—1857.

While Bourseuil's conception was being digested by Reis, another invention, having also a membrane diaphragm as its motive principle, was patented in France in 1857. This was the phonautograph, by Léon Scott, which had for its purpose the recording of sound vibrations upon a cylinder rotated by hand and moved forward by a screw (Fig. 1). The cylinder was covered with paper, this was smoked over a flame, and a stylus attached to the center of a diaphragm, under the influence of words spoken into a large barrel-like mouthpiece, would trace sound vibrations upon the smoky surface. Scott also employed an animal membrane for his diaphragm, and took pains, by means of an attachment called a subdivider, to make the vibrations appear as large as possible. This subdivider,

[Endorsed]: Filed Jun. 16, 1913. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [171]

[Affidavit of Louis Hicks, Filed June 23, 1913.]

*In the District Court of the United States for the
Northern District of California, Second Di-
vision.*

SEARCHLIGHT HORN COMPANY,
Plaintiff,

vs.

BABSON BROTHERS INCORPORATED,
Defendant.

SEARCHLIGHT HORN COMPANY,
Plaintiff,

vs.

PACIFIC PHONOGRAPH COMPANY,
Defendant.

State of California,
City and County of San Francisco,—ss.

Louis Hicks, being duly sworn, deposes and says:

I am of counsel for defendants in the above-en-
titled suits and have heretofore made an affidavit
therein. Since leaving New York City on June 10,
I have read a copy of the testimony in the former
action at law on the Nielsen patent in this Court
against Sherman Clay & Co. I find that William
H. Locke, Jr., testified October 1, 1912, on direct
examination, by Mr. Miller, that he was President of
the plaintiff, Searchlight Horn Company; that in
May, 1908, the Searchlight Horn Company ceased to

do business and turned over its machinery and the whole matter of manufacturing and selling horns to the Standard Metal Mfg. Co. of [172] Newark, N. J.; that the Standard Metal Mfg. Co. thereafter manufactured horns in accordance with the Nielsen patent here in suit, said horns being like the horns sold by the Victor Talking Machine Co.; and that the Standard Metal Mfg. Co., under said arrangement, paid a royalty to the Searchlight Horn Co. for said horns made and sold by it (Record, pp. 59-61). Mr. Locke also testified October 1, 1912, on direct examination (Record, p. 62);

“Q. The whole matter has been turned over to the Standard Metal Manufacturing Company under the terms which you stated? A. Yes.

Q. Just give us some idea of the size of the Standard Metal Manufacturing Company and its ability to supply the market? A. Well, the Standard Metal Manufacturing Company to-day, is the largest manufacturer of talking machine horns in the country. It manufactures the bulk of the horns for the Edison Phonograph Company and the Victor Talking Machine Company.”

I have been informed by Mr. Delos Holden, General Counsel for the Thomas A. Edison, Inc., and believe and, therefore, allege that the said Standard Metal Mfg. Co. has been making for said Thomas A. Edison, Inc., and its predecessor, National Phonograph Company, continuously since May, 1908, metal horns for phonographs of the kind alleged by plaintiff to infringe the Nielsen patent in suit. Said

Thomas A. Edison, Inc., and its predecessor, National Phonograph Company, has been the company putting upon the market "the Edison Phonograph" since 1896-1897, and is and has been known, for that reason, as the Edison Phonograph Company, to which Mr. Locke referred in his testimony above quoted. It appears therefore, that the horns sold by defendants and charged with infringement are horns put upon the market by the authority of the plaintiff.

I also find that in said former action at law, plaintiff's expert, Mr. Vale, testified (Record, p. 85):
[173]

"Q. How does a rib differ mechanically from a seam?

A. Well, a rib is a thickening in cross-section within narrow longitudinal limits of the body of any material. It might be an overlapping of that material, or it might be an integral thickening of it and still be a rib.

The COURT.—Q. There might be a rib without a seam? A. Yes.

Q. And a seam might be so constructed as to constitute a rib? A. Yes."

Mr. Krabbe testified that Nielsen made horns, under his patent, by joining together the adjacent edges of the tapering strips composing the horns, by means of overlapping seams, that is, by placing one edge upon or over the adjacent edge and soldering them together. (Record, pp. 26, 119, 85 and Exhibit 12.)

Mr. Vale also testified (Record, p. 96) that the Nielsen patent "says here 'plurality of longitudinal

strips' "; and he added (Record, p. 96):

“Q. Two would be a plurality, would it not?

A. Yes.”

Upon the question of *laches*, Mr. Krabbe, and Mr. Locke testified, in the said former action at law, that both before and after Nielsen filed his application for the patent in suit, others were constantly making and selling in this country, horns claimed to infringe the patent (Record, pp. 18, 20, 47, 58, 65). Mr. Locke also testified that he tried to “get together” with the Hawthorne & Sheble Co., with regard to the making and selling of horns, calling upon them, (Record, p. 58), thus confirming what Mr. Hawthorne says in his affidavit.

LOUIS HICKS.

Subscribed and sworn to before me this 23d day of June, 1913.

[Seal]

C. W. CALBREATH,

Deputy Clerk U. S. Dist. Court, Northern District of California. [174]

[Endorsed]: Filed Jun. 23, 1913. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [175]

[**Affidavit of C. D. Emerson.**]

*In the District Court of the United States for the
Northern District of California, Second Di-
vision.*

IN EQUITY—No.—.

On Nielsen Patent No. 771,441
(Phonograph Horn).

SEARCHLIGHT HORN COMPANY,

vs.

PACIFIC PHONOGRAPH COMPANY.

IN EQUITY—No.—.

On Nielsen Patent No. 771,441
(Phonograph Horn).

SEARCHLIGHT HORN COMPANY,

vs.

BABSON BROTHERS, INCORPORATED.

State of New York,

County of New York,—ss.

C. D. Emerson, being duly sworn, deposes and says: I am of lawful age and reside in the city of Orange, N. J. I have been in the talking-machine business over twenty years.

During the period 1897–1904, I was employed in New York City by the Columbia Phonograph Co. (General). I have just delivered to Messrs. Mauro, Cameron, Lewis & Massie, patent attorneys, located in the Woolworth Building, in the City of New York, a phonograph horn which was constructed for me by the Tea Tray Co. in the latter part of 1897 or

early in 1898, and which has been in my possession continuously ever since. This horn was used by me upon talking machines (graphophones and phonographs), openly and publicly, in the regular course of business, and in giving public exhibitions, in the city of New York, during the years 1898, 1899, 1900, and 1901. During that period we procured from said Tea Tray Co. and used, in similar manner, a number of other sectional sheet-metal horns substantially identical with the one already referred to. During about [176] the same period, but perhaps a little later, yet earlier than the year 1904, we procured, and used, a number of flaring sheet-metal phonograph horns, substantially similar to the ones already referred to, except that they were made up of *three* longitudinal sections with *three* longitudinal joints constituting ribs, and were provided with a unitary "bell mouth." These three-section horns were used in New York City, in public, prior to 1904, for reproducing sound-records upon graphophones.

This horn made for me is a flaring horn. It consists of a plurality of longitudinal sections, made of tapering pieces of sheet-metal, united by interlocking joints to constitute external stiffening-ribs that extend longitudinally the full length of the horn.

Our purpose in making this horn in sections with longitudinal ribs, was to stiffen the horn, and in order to prevent the tendency to metallic vibrations of the walls of the otherwise too-sensitive sheet-metal horn.

I annex hereto, as part of this affidavit, a correct photograph of said horn, which latter is now before

me. I have identified said horn by scratching thereon my initials and the date of this affidavit: "C. D. E. 6/18/1913", and have left the same with Mr. Massie. The photograph thereof is herein inserted on the following page:

(Signed) C. D. EMERSON.

Subscribed and sworn to before me this 18th day of June, 1913.

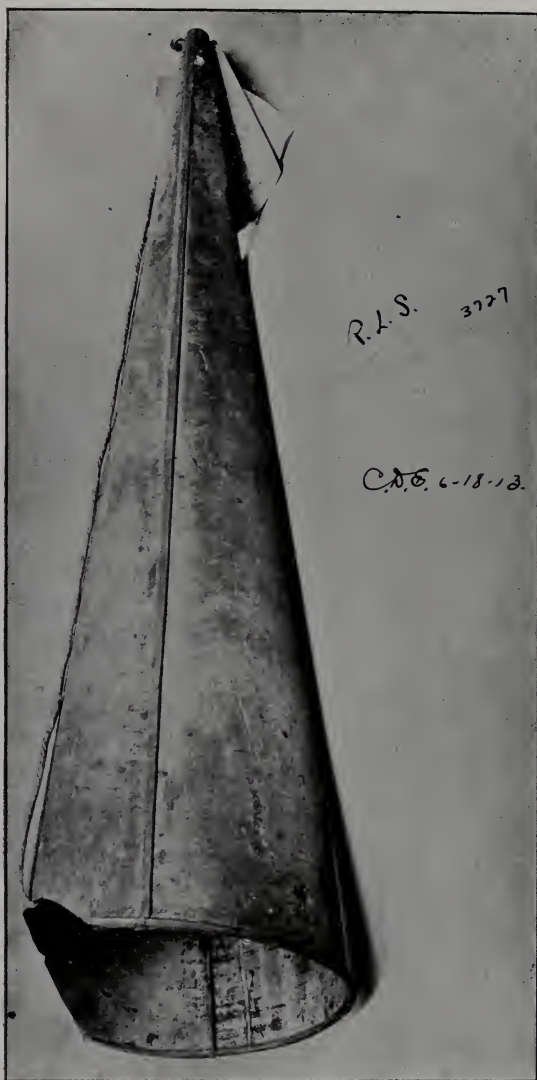
[Seal] (Signed) RALPH LANE SCOTT,
Notary Public, No. 3727, New York County. [177]
No. 29,246.

State of New York,
County of New York,—ss.

I, William F. Schneider, Clerk of the County of New York, and also Clerk of the Supreme Court for the said County, the same being a Court of Record, do hereby certify, that James Lane Scott, before whom the annexed deposition was taken, was, at the time of taking the same, a notary public of New York, dwelling in said county, duly appointed and sworn, and authorized to administer oaths to be used in any court in said State, and for general purposes; that I am well acquainted with the handwriting of said notary, and that his signature thereto is genuine, as I verily believe.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said Court and County, the 18th day of June, 1913.

[Seal] WM. J. SCHNEIDER,
Clerk. [178]



[Affidavit of August Robert Pommer.]

*In the District Court of the United States, for the
Northern District of California, Second Division.*

SEARCHLIGHT HORN COMPANY,

Plaintiff,

vs.

BABSON BROTHERS, INCORPORATED,

Defendant.

SEARCHLIGHT HORN COMPANY,

Plaintiff,

vs.

PACIFIC PHONOGRAPH COMPANY,

Defendant.

August Robert Pommer, being duly sworn, deposes and says:

I am over the age of twenty-one (21) years and reside in San Francisco. I have been engaged in the phonograph business ever since the year 1893. I became engaged in the phonograph business in 1893 at Sacramento, California, and continued there in that business until January 10th, 1910, when I purchased the jobbing business of the Pacific Phonograph Company and came to San Francisco. In March, 1910, I purchased the jobbing phonograph business of Peter Bacagalupi & Sons. In January, 1901, I later purchased the jobbing business of the A. J. Pommer Company of Sacramento.

For at least eight years, I have known of the

Flower Horns made and sold by Hawthorne & Sheble of Philadelphia, Pa. [180] Those horns were made of a number of tapering strips of metal joined together at their edges by seams, forming longitudinal ribs, the construction being similar to the construction of the flaring end of the Edison Straight Horns. Such horns of the Hawthorne & Sheble Company were upon the market in Sacramento at least eight years ago. I have also known of similar horns made by the Standard Metal Mfg. Company being upon the market in California for several years last past.

I never heard of the Nielsen patent here in suit until the trial of the suit upon that patent against Sherman Clay & Co. in the latter part of 1912. I never heard, prior to the trial of that suit, any suggestion or threat of litigation with respect to such horns as the above-described Flower Horns, made and sold by Hawthorne & Sheble or similar horns, and had no reason to suppose that anyone claimed that the making or selling of such horns infringed upon any patent or other right.

Ever since 1893, when I began the phonograph business, I have made a very careful study of the sound producing qualities of horns for phonographs and I have tested many horns in order to ascertain their sound producing qualities. As a result of my study, experiments and experience of twenty years with horns for phonographs, I have no hesitation in saying that it is my positive conclusion that there is no difference in the sound producing qualities of a metal horn, whether it is composed of a single piece

of metal and provided with one longitudinal seam or rib, or whether it is composed of several tapering strips of metal and provided with several longitudinal seams or ribs. In other words, the sound producing qualities of the Hawthorne & Sheble Black and Gold horn and the sound producing qualities of their Flower horn were and are the same. They each give forth the same metallic sound. In my opinion, a horn composed of a single piece of metal, [181] and provided with only one longitudinal seam or rib, is superior to the other horn described, since there is less tendency on the part of the horn to rattle. Horns made of wood are superior to horns made of metal, and are now, and have heretofore been sold in large quantities upon the market.

AUGUST ROBERT POMMER.

Subscribed and sworn to before me this 20th day of June, A. D. 1913.

[Seal]

J. D. BROWN,

Notary Public in and for the City and County of San Francisco, State of California.

Due service of the within Affidavit by copy is hereby admitted this 19th day of June, 1913.

J. H. MILLER,

Attorney for Plaintiff. [182]

[Affidavit of Peter Bacigalupi.]

*In the District Court of the United States, for the
Northern District of California, Second Division.*

SEARCHLIGHT HORN COMPANY,

Plaintiff,

vs.

BABSON BROTHERS, INCORPORATED,

Defendant.

SEARCHLIGHT HORN COMPANY,

Plaintiff,

vs.

PACIFIC PHONOGRAPH COMPANY,

Defendant.

State of California,

City and County of San Francisco,—ss.

Peter Bacigalupi, being duly sworn, deposes and says:

I am over the age of 21 years and am the senior member of the firm of Peter Bacigalupi & Sons, doing business in phonographs and supplies therefor, at 908 Market Street, San Francisco. I have been in the phonograph business, in the City of San Francisco, ever since the year 1894.

Mr. Hicks, counsel of defendants herein, has exhibited to me the photographic copy of the advertisement [183] annexed to the affidavit of Mr. E. A. Hawthorne herein, said advertisement showing the well-known black and gold horn and the flower

horn, made and sold for many years, throughout the United States. Said flower horn is similar in its construction to the Edison straight horn, in that each is composed, in whole or in part, of a number of tapering strips of metal joined together at their edges. To my knowledge, such horns as the flower horn of the said Hawthorne advertisement, have been upon the market in the United States for more than eight years. For many years I have dealt in horns manufactured by Hawthorne & Sheble, including said black and gold horn, which is provided with one longitudinal seam or rib and said flower horn, which is provided with several longitudinal seams or ribs. I have made numerous tests of the sound producing qualities of said two horns and similar horns, especially tests thereof for intending purchasers of horns. I never was able to see any difference in the sound producing qualities of such horns notwithstanding my long experience in the phonograph business, beginning as above stated in 1894. I do not believe any difference in the sound producing qualities of horns for phonographs, results from the number of longitudinal ribs or seams with which the horn is provided or from the number of strips of sheet material of which the horn is composed. Said black and gold horn and said flower horn of said Hawthorne advertisement have the same sound producing qualities, and each gives forth the same metallic sound.

Until the suit upon the Nielsen patent against Sherman Clay & Company came to trial, in the latter part of 1912, I had never heard of said Nielsen

patent; nor had I ever heard of any threats of litigation made with respect to such horns as said flower horn of said Hawthorne advertisement, [184] notwithstanding the fact that such flower horns had been on the market on the Pacific Coast for more than 8 years when said suit against Sherman Clay & Company came on for trial. A gentleman by the name of Mr. Locke and his attorney called upon me and spoke to me with reference to said suit upon said Nielsen patent. I expressed to him my surprise at hearing of the suit, since such horns had been upon the market without any indication of litigation so far as I ever knew, for so many years.

PETER BACIGALUPI.

Subscribed and sworn to before me this 16th day of June, A. D. 1913.

[Seal]

J. D. BROWN,

Notary Public in and for the City and County of San Francisco, State of California. [185]

[Affidavit of Peter Bacigalupi, Jr.]

In the District Court of the United States, for the Northern District of California, Second Division.

SEARCHLIGHT HORN COMPANY,

Plaintiff,

vs.

BABSON BROTHERS, INCORPORATED,

Defendant.

SEARCHLIGHT HORN COMPANY,

Plaintiff,

vs.

PACIFIC PHONOGRAPH COMPANY,

Defendant.

State of California,

City and County of San Francisco,—ss.

Peter Bacigalupi, Jr., being duly sworn, deposes and says:

I am over the age of 21 years and reside in the City of San Francisco; I am a member of the firm of Peter Bacigalupi & Sons, doing business in phonographs and supplies therefor, etc., at 908 Market Street, San Francisco; I have been in the phonograph business ever since the year 1894, in and about the City of San Francisco.

I am familiar with the horns for phonographs, constructed of tapering strips of metal joined together at the edges, like the [186] horn known as the Edison straight horn, and similar horns; I was familiar with the Flower Horn, put upon the market by Hawthorne & Sheble Mfg. Co., in or about the year 1903 or 1904; the Hawthorne & Sheble Flower Horn was constructed of tapering strips of metal joined together at their edges and was like the Edison straight horns. To my knowledge, such horns have been upon the market for more than eight (8) years. I never heard of the Nielsen patent, upon which the two above entitled suits are brought, until the suit of the Searchlight Horn Company against Sherman Clay & Company came to trial in the lat-

ter part of 1912. Previous to the latter part of 1912, when said suit came to trial, I had never heard of any other suit being brought upon said patent, nor had I ever heard of any threat of any kind made with reference to said Nielsen patent, notwithstanding the fact that horns constructed as above described had been upon the market on the Pacific Coast for more than eight (8) years last past.

PETER BACIGALUPI, Jr.

Subscribed and sworn to before me this 16th day of June, A. D. 1913.

[Seal]

J. D. BROWN,

Notary Public in and for the City and County of San Francisco, State of California. [187]

[Affidavit of Lewis H. Abbott.]

In the District Court of the United States, for the Northern District of California, Second Division.

SEARCHLIGHT HORN COMPANY,

Plaintiff,

vs.

BABSON BROTHERS, INCORPORATED,

Defendant.

SEARCHLIGHT HORN COMPANY,

Plaintiff,

vs.

PACIFIC PHONOGRAPH COMPANY,

Defendant.

State of California,

City and County of San Francisco,—ss.

Lewis H. Abbott, being duly sworn, deposes and says:

I reside in Oakland, Alameda County, California. I am employed by the Pacific Phonograph Company, defendant herein. I have been employed by the Pacific Phonograph Company continuously since about June, 1910. I am the only one now present in San Francisco that has been in the employ of the Pacific Phonograph Company for so long a period of time. The President of the Pacific Phonograph Company, Mr. A. R. Pommer, is now absent from San Francisco.

I am familiar with the horn known as the Edison Straight Horn and with the construction thereof. I have been engaged in the Phonograph business since the beginning of the year 1909, [188] when I was engaged in such business at Seattle, Wash.

Before I entered the phonograph business I knew that horns made of tapering strips of metal joined together at their edges like the Edison Straight Horn and like horns made by the Tea Tray Company were on the market and had been on the market for some time. Before the present suit was brought against the Pacific Phonograph Company, the defendant herein, I had never heard of the Nielsen Patent, nor had I ever heard of any litigation of any kind threatened against such horns as the Edison Straight horn.

LEWIS H. ABBOTT.

Subscribed and sworn to before me this 16th day of June, A. D. 1913.

[Seal]

J. D. BROWN,

Notary Public in and for the City and County of San Francisco, State of California.

Recd. copy June 16, 1913.

J. H. MILLER,
Atty. for Plff.

[Endorsed]: Filed Jun. 16, 1913. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [189]

[Affidavit of James S. Baley.]

*In the District Court of the United States for the
Northern District of California, Second Division.*

SEARCHLIGHT HORN COMPANY,
Plaintiff,

vs.

BABSON BROTHERS, INCORPORATED,
Defendant.

SEARCHLIGHT HORN COMPANY,
Plaintiff,

vs.

PACIFIC PHONOGRAPH COMPANY,
Defendant.

State of California,
City and County of San Francisco,—ss.

James S. Baley, being duly sworn, deposes and says:

I reside at 1533 Spruce Street, Berkeley, Cal. I

am employed by Babson Brothers, Inc., as manager of their branch store at 65 Post Street, San Francisco. Babson Brothers, Inc., deal in phonographs and supplies therefor. About February 1, 1911, I entered the employ of Babson Brothers, Inc., in Chicago, Illinois, and continued in their employ at Chicago for about nine (9) months, when I came to San Francisco, and took charge of their branch store here, which was opened in November, 1910.

Prior to the beginning of this suit against Babson [190] Brothers, Inc., I had never heard of the Nielsen patent in suit. When I became connected with Babson Brothers, Inc., in Chicago, I became familiar with horns for phonographs, composed of tapering strips of metal, and with the Edison Straight and Signet Horns, such horns being then on the market. Prior to the beginning of this suit, against Babson Brothers, Inc., I had never heard of any threat of litigation with respect to such horns. I am the only one here in San Francisco, connected with Babson Brothers, Inc., that has a knowledge of the facts above set forth, extending as far back as February 1, 1911.

I am familiar with horns sold for use with talking machines. Exposed horns for talking machines are going out of use since talking machines inclosed in cabinets and provided with concealed sound amplifying means are coming generally into use. Of the exposed horns, I regard those made of wood as being superior to those made of metal, since the wooden horns reproduce the sounds of the phonograph record more clearly, and without the metallic sound given

forth from horns made of metal strips, secured together at their edges so as to form longitudinal ribs. It is for this reason that bell-shaped horns made of tapering strips of wood, joined together at their edges, are preferred to metal horns similarly constructed, notwithstanding the fact that the wooden horns are more expensive than the metal horns.

JAMES S. BAILEY.

Subscribed and sworn to before me this 17th day of June, A. D. 1913.

[Seal]

J. D. BROWN,

Notary Public in and for the City and County of San Francisco, State of California. [191]

Due service of the within affidavit by copy is hereby admitted this 19th day of June, 1913.

MILLER & WHITE,

Attorney for Plaintiff.

[Endorsed]: Filed Jun. 23, 1913. W. B. Maling, Clerk. By. J. A. Schaertzer, Deputy Clerk. [192]

At a stated term, to wit, the March term, A. D. 1913, of the District Court of the United States of America, in and for the Northern District of California, Second Division, held at the courtroom in the City and County of San Francisco, on Tuesday, the 24th day of June, in the year of our Lord one thousand nine hundred and thirteen. Present: The Honorable WILLIAM C. VAN FLEET, District Judge:

IN EQUITY—No. 18.

SEARCHLIGHT HORN COMPANY,

Plaintiff,

vs.

PACIFIC PHONOGRAPH COMPANY,

Defendant.

Order Granting Injunction.

The plaintiff's motion for an injunction *pendente lite* having come on to be heard this day before the court, John H. Miller, Esq., appearing as attorney for defendant, and Louis Hicks, Esq., as attorney for defendant, and the said motion having been argued by counsel for the respective parties, and the Court having heard and duly considered the same, and being fully advised in the premises,

IT IS ORDERED that the plaintiff's said motion for an injunction *pendente lite* be and the same is hereby granted upon the filing by plaintiff of a good and sufficient indemnity bond in the sum of One Thousand Dollars. [193]

In the District Court of the United States for the Northern District of California, Second Division.

IN EQUITY—No. 18.

SEARCHLIGHT HORN COMPANY,

Plaintiff.

vs.

PACIFIC PHONOGRAPH COMPANY,

Defendant.

**Petition for Allowance of Appeal With
Supersedeas.**

The defendant above named, conceiving itself aggrieved by order heretofore made and entered in the above-entitled cause on the 24th day of June, 1913, wherein and whereby it was ordered, adjudged and decreed that the plaintiff's motion for preliminary injunction *pendente lite* be granted upon the filing of the plaintiff, of a good and sufficient indemnity bond in the sum of One Thousand (\$1,000.00) Dollars (which said bond was thereafter waived by stipulation of the parties, and under order of Court, for the consideration that the defendant herein should execute a bond for a stay of said preliminary injunction, which said bond for stay of said injunction has heretofore been given, approved and filed), does hereby appeal from the said decree of the United States Circuit Court of Appeals for the Ninth Judicial Circuit, for the reason specified in the Assignment of Errors filed herein and herewith.

And it prays that this appeal may be allowed; that a transcript of the records, papers and proceedings upon which said order was made, duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Circuit, and that an order [194] be made fixing the amount of security which defendant shall give and furnish on said appeal, and that upon the giving of said security all proceedings in this Court with reference to said preliminary injunction shall be suspended and stayed until the determination of said appeal by said United States Circuit Court

of Appeals for the Ninth Circuit, and your petitioner will ever pray, etc.

H. C. SCHAERTZER,
D. HADSELL, and
LOUIS HICKS,
Attorneys for Defendant.

[Endorsed]: Filed July 1, 1913. W. B. Maling,
Clerk. [195]

*In the District Court of the United States for the
Northern District of California, Second Divi-
sion.*

IN EQUITY—No. 18.

SEARCHLIGHT HORN COMPANY,
Plaintiff,

vs.

PACIFIC PHONOGRAPH COMPANY,
Defendant.

Assignment of Errors.

The defendant in the above-entitled suit hereby makes and files the following assignment of errors, in support of its appeal from the order or decree granting a preliminary injunction in said suit, and entered in the office of the Clerk of this Court on the 24th day of June, 1913:

I.

The Court erred in granting said preliminary injunction.

II.

The Court erred in not holding that claims 1, 2 and 3 of the Nielsen patent in suit, No. 771,441, and each

of them, is void for lack of invention, in view of the prior art.

III.

The Court erred in not holding claims 1, 2 and 3 of the Nielsen patent in suit, No. 771,441 and each of them, is void, because anticipated by the patents, publications and uses of the prior art and by each of said patents, publications and uses of the prior art, adduced by said defendant.

IV.

The Court erred in not holding that claims 1 and 2 of the [196] Nielsen patent in suit and each of them is limited to longitudinal strips of metal provided at their edges with longitudinal, outwardly directed flanges.

V.

The Court erred in not holding that claim 3 is different from claims 1 and 2 and from each of said two claims of the Nielsen patent in suit No. 771,441.

VI.

The Court erred in holding that defendant had infringed the Nielsen patent in suit No. 771,441, and in not holding that defendant had not infringed any of the claims of said patent.

VII.

The Court erred in not holding that, in view of the prior art, the three claims of the said Nielsen patent, and each of them, is limited by strips provided at their edges with longitudinal outwardly directed flanges and that by reason of such limitation, said three claims and each of them were not infringed by defendant.

VIII.

The Court erred in not denying the motion for preliminary injunction upon the ground that plaintiff had been guilty of laches and neglect for such a period of time before the bringing of this suit and the making of said motion, that it was not entitled to an injunction or to any relief in a Court of Equity.

IX.

The Court erred in not holding that the horns of defendant, charged with infringement, were made and sold under the authority of the plaintiff, and that, therefore, defendant was not guilty of any infringement of said Nielsen patent. [197]

X.

The Court erred in not holding that there was no proof that the horns of defendant charged with infringement were not the horns put upon the market under the authority of the plaintiff, and that, therefore, there was no proof that defendant had infringed said Nielsen patent in suit.

XI.

The Court erred in not dismissing the Bill of Complaint of plaintiff upon the ground that it appeared that the bill is lacking altogether in equity.

WHEREFORE, defendant prays that said order

or decree granting a preliminary injunction be reversed.

H. C. SCHAERTZER and
D. HADSELL,
Solicitors for Defendant.

LOUIS HICKS,
Of Counsel for Defendant.

[Endorsed]: Filed July 1, 1913. W. B. Maling,
Clerk. [198]

*In the District Court of the United States for the
Northern District of California, Second Di-
vision.*

IN EQUITY—No. 18.
SEARCHLIGHT HORN COMPANY,
Plaintiff,
vs.
PACIFIC PHONOGRAPH COMPANY,
Defendant.

Order Allowing Appeal.

On the petition of defendant in the above-entitled cause and on the motion of attorneys for defendant, it is ordered that an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the order heretofore made and entered in this cause, granting a preliminary injunction, be and the same is hereby allowed and that a certified transcript of the records, papers and all proceedings hereto, be forthwith transmitted to the United States Circuit Court of Appeals.

IT IS ORDERED that the bond on appeal be and the same is hereby fixed at the sum of Three hundred (\$300.00) Dollars, as a bond for costs and damages on appeal;

AND WHEREAS, upon stipulation of the parties hereto, it was agreed that the said order granting said preliminary injunction shall be stayed pending the appeal from said order, upon the filing by defendant, of a bond in the penal sum of One thousand (\$1,000.00) Dollars which said bond has been filed accordingly and approved.

NOW, THEREFORE, IT IS HEREBY ORDERED that said bond shall act as a supersedeas bond so far as proceedings with reference to this preliminary injunction are concerned. [199]

IT IS FURTHER ORDERED that a citation shall be issued to the defendant accordingly.

Dated: July 2d, 1913.

WM. C. VAN FLEET,
Judge of the United States District Court, Second
Division, in and for the Northern District of
California.

[Endorsed]: Filed Jul. 2, 1913. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [200]

*In the District Court of the United States for the
Northern District of California, Second Di-
vision.*

IN EQUITY—No. 18.

SEARCHLIGHT HORN COMPANY,

Plaintiff,

vs.

PACIFIC PHONOGRAPH COMPANY,

Defendant.

Order Fixing Amount of Bond on Appeal.

Defendant, having this day filed its petition for leave to appeal from the order granting preliminary injunction made and entered in this cause to the United States Circuit Court of Appeals in and for the Ninth Judicial Circuit, together with an Assignment of Errors, within due time, and also praying that an order be made fixing the amount of security which defendant should give and furnish upon said appeal, and that upon the giving of said security all further proceedings in this court with reference to said preliminary injunction shall be suspended and stayed until the determination of said appeal by the said United States Circuit Court of Appeals in and for the Ninth Judicial Circuit, and said petition having been duly allowed.

NOW, THEREFORE, IT IS HEREBY ORDERED that upon the said defendant filing with the Clerk of this Court, a good and sufficient bond in the sum of Three Hundred (\$300.00) Dollars, to the effect that if the said defendant shall prosecute said

appeal to effect and answer all damages and costs, if said [201] defendant fails to make good said appeal, then the said obligation shall be void; otherwise, to remain in full force and effect; said bond to be approved by the Court; that all further proceedings in this court with reference to said preliminary injunction be and they are hereby suspended and stayed until the determination of said appeal by the United States Circuit Court of Appeals.

Dated: July 2nd, 1913.

WM. C. VAN FLEET,
Judge of the United States District Court, in and for
the Northern District of California, Second
Division.

[Endorsed]: Filed Jul. 2, 1913. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [202]

*In the District Court of the United States for the
Northern District of California, Second Di-
vision.*

IN EQUITY—No. 18.

SEARCHLIGHT HORN COMPANY,
Plaintiff,

vs.

PACIFIC PHONOGRAPH COMPANY,
Defendant,

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS,
that we, the undersigned, Pacific Phonograph Com-
pany, a corporation, as principal, and the United

States Fidelity and Guaranty Company of Baltimore, a corporation, organized under the laws of the State of Maryland, having its principal place of business in the city of Baltimore, State of Maryland, and having paid up capital of not less than Two Million (\$2,000,000.00) Dollars, for the purpose of making, guarantying, and becoming surety on bonds and undertakings, and having complied with all the requirements of the laws of the State of California respecting such corporations, as surety are held and firmly bound unto Searchlight Horn Company, a corporation, in the full and just sum of Three Hundred (\$300.00) Dollars to be paid to the Searchlight Horn Company, a corporation, its attorneys, assigns and successors, to which payment, well and truly to be made, we bind ourselves, our assigns and successors jointly and severally, firmly by these presents. [203]

Sealed with our seals and dated this — day of July in the year of our Lord, one thousand nine hundred thirteen.

WHEREAS, at a session of the United States District Court in and for the Northern District of California, Second Division thereof, in the above-entitled action, an order granting a preliminary injunction was rendered and entered in said action as against the defendant above named on or about the 24th day of June, 1913, and the said defendant, having obtained from said Court an order allowing an appeal to the United States Circuit Court of Appeals in and for the Ninth Judicial Circuit, to reverse said order of the aforesaid Court, and a citation directed to the

said above-named plaintiff is about to be issued citing and admonishing it to be and appear at the United States Circuit Court of Appeals for the Ninth Judicial Circuit to be held at San Francisco, State of California.

Now, the conditions of the above obligation are such that if the said defendant shall prosecute said appeal to effect and shall answer all damages and costs that may be awarded against it if it fails to make good this appeal, then the above obligation shall be void; otherwise it shall remain in full force and effect.

PACIFIC PHONOGRAPH COMPANY,

[Seal]

By A. R. POMMER,

Pres.

UNITED STATES FIDELITY & GUAR-
ANTY CO. [Seal]

By B. P. OAKFORD,

Attorney in Fact.

JESSE W. WHITED,

Attorney in Fact. [204]

Approved:

WM. C. VAN FLEET.

[Endorsed]: Filed Jul. 2, 1913. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [205]

*In the District Court of the United States for the
Northern District of California, Second Di-
vision.*

SEARCHLIGHT HORN COMPANY,

Plaintiff,

vs.

PACIFIC PHONOGRAPH COMPANY,

Defendant.

Stipulation [as to Record and Hearing on Appeal].

WHEREAS, the plaintiff's notice of motion for preliminary injunction in the above-entitled action sets forth, among other things, that plaintiff in making its motion will rely upon "the judgment-roll, the petition for new trial the order denying the new trial and the horn exhibits in connection with action #15,326 in this court, entitled Searchlight Horn Company vs. Sherman Clay & Company; also the papers, pleadings in the suit in equity in this court of the Searchlight Horn Company against Sherman Clay & Company, #15,623, and the order granting a preliminary injunction itself in said actions"; and

WHEREAS, an appeal in the case #15,326 from the judgment therein is being taken to the Circuit Court of Appeals for the Ninth Circuit, and appeal of the case #15,623 from the order granting a preliminary injunction and the preliminary injunction is being taken to said Circuit Court of Appeals for the Ninth Circuit; and

WHEREAS, the records of both of said numbered actions will be in the Circuit Court of Appeals at the

time at which the appeal in this action will be heard;
and

WHEREAS, it is the desire of the parties hereto to make as small and inexpensive record on appeal as possible in this case,

NOW, THEREFORE, IT IS STIPULATED between them,

1. That said judgment-roll, in connection with action [206] #15,623 and the papers and pleadings, order granting preliminary injunction in the action #15,623 need not be made a part of the record on appeal in this action.

2. That upon the hearing of the appeal in this action said judgment-roll in action #15,326, and papers and pleadings and order granting preliminary injunction and the preliminary injunction in the action #15,623, as those shall appear in the records on appeal in said actions in the Circuit Court of Appeals of the Ninth Circuit, may be used by either party hereto on this appeal, and for the purpose of this appeal shall be considered as part of the record on appeal in this case.

LOUIS HICKS and
D. HADSELL,

Attorneys for Appellant and Defendant.

MILLER & WHITE,

Attorneys for Respondent and Plaintiff.

Aug. 15, 1913.

[Endorsed]: Filed Aug. 19, 1913. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [207]

*In the District Court of the United States for the
Northern District of California, Second Division.*

No. 18.

SEARCHLIGHT HORN COMPANY,

Plaintiff,

vs.

PACIFIC PHONOGRAPH COMPANY,

Defendant.

Order Allowing Withdrawal of Exhibits.

Good cause appearing therefor, it is ordered that Plaintiff's Exhibit "Edison Catalogue," Plaintiff's Exhibits No. 1, No. 2, No. 3, No. 4, No. 5 and Defendant's Exhibits, United States and Foreign Patents, be and hereby are allowed to be withdrawn from the files of the Court in this cause and transmitted by the Clerk of this Court to the United States Circuit Court of Appeals for the Ninth Circuit, as a part of the record upon appeal; said original exhibits to be returned to the files of this Court upon the determination of said appeal by said United States Circuit Court of Appeals.

WM. C. VAN FLEET,

United States District Judge.

[Endorsed]: Filed Aug. 29, 1913. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [208]

**[Certificate of Clerk U. S. District Court to
Transcript of Record.]**

*In the District Court of the United States for the
Northern District of California, Second Division.*

No. 18.

SEARCHLIGHT HORN COMPANY,

Plaintiff,

vs.

PACIFIC PHONOGRAPH COMPANY,

Defendant.

I. Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify the foregoing two hundred and eight pages, numbered from 1 to 208, inclusive, to be a full, true and correct copy of the record and proceedings in the above-entitled cause, excepting therefrom the following original exhibits, viz.: Plaintiff's Exhibit "Edison Catalogue," Plaintiff's Exhibits No. 1, 2, 3, 4 and 5, and Defendant's Exhibits, "United States and Foreign Patents" (which by order of Court are allowed to be withdrawn and transmitted herewith as a part of this record), and that the same constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the cost of the foregoing Transcript of Record on appeal is \$124.00; that the said amount was paid by Louis Hicks, counsel for de-

fendant, and that the original citation issued in said cause is hereto annexed.

In testimony whereof, I have hereunto set my hand, and affixed the seal of said District Court, this 29th day of August, A. D. 1913.

[Seal] WALTER B. MALING,
Clerk of the District Court of the United States,
Northern District of California.

By J. A. Schaertzer,
Deputy Clerk. [209]